SUPREME COURT COPY

SUPREME COURT
FILED
JUN 22 2007
Frederick K. Ohlrich Clerk
Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

NATHAN JAMES VERDUGO,

Defendant and Appellant.

S083904

CAPITAL CASE

Los Angeles County Superior Court No. BA105622
The Honorable Curtis B. Rappe, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

JOHN R. GOREY
Deputy Attorney General

DAVID C. COOK
Deputy Attorney General
State Bar No. 172866

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-4991
Fax: (213) 897-6496
Email: David.Cook@doj.ca.gov

Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
I. GUILTY PHASE	3
A. Prosecution Case-In-Chief At The Guilt Phase	3
1. Party At The Home Of Hector Casas	3
2. The Shooting Near The Fire Station	8
3. Autopsy Evidence	13
4. Appellant's Activities Following The Shooting And The Next Morning	15
5. The Eyeglasses Recovered At The Scene Of The Murder	16
6. Firearm And Ballistics Evidence	18
7. Evidence Regarding Appellant's Honda CRX	20
8. Other Police Investigation	22
9. The Testimony Of Donna Tucker	31
10. Appellant's Arrest	42
B. Defense Case At The Guilt Phase	44
1. Appellant's Testimony	44
a. Appellant's Testimony Regarding His Role In The Crimes	44
b. Appellant's Testimony Regarding The Burning Of Tommy's Car	49

TABLE OF CONTENTS (continued)

Page

c. Appellant's Testimony About The CRX 52

d. Appellant's Testimony About The Eyeglasses 53

e. Appellant's Testimony Regarding Donna Tucker 54

f. Appellant's Testimony About Fleeing From The Police And His Arrest 54

2. Other Defense Evidence 61

a. Detective Ewing Kwock 61

b. Detective Teague 61

c. Detective Markel 63

d. Richard Marouka 65

e. Ray Muro 65

f. Mary Alice Baldwin 66

C. Prosecution's Rebuttal 69

D. Stipulation 70

II. PENALTY PHASE 71

A. People's Case 71

1. Testimony Of Richard Rodriguez's Family 71

2. Testimony Of Yolanda Navarro's Family 72

TABLE OF CONTENTS (continued)

	Page
B. Defense Case	74
ARGUMENT	77
I. **THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR SECOND COUNSEL**	77
II. **THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S PROFFERED EVIDENCE REGARDING DETECTIVES TEAGUE AND MARKEL TO EXPLAIN WHY APPELLANT FABRICATED DEFENSE EVIDENCE**	80
A. Relevant Proceedings At Trial	81
B. Relevant Legal Principles	82
C. The Probative Value Of The Evidence Regarding Detectives Teague And Markel Being Investigated For Fabrication Of Evidence Was Substantially Outweighed By The Danger Of Undue Prejudice	83
D. Even If Error Occurred, Any Error Was Harmless	84
III. **THE PROSECUTION COMPLIED WITH ITS DUTIES TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE PURSUANT TO *BRADY v. MARYLAND* AND COMPLIED WITH ITS DUTIES REGARDING DISCOVERY PURSUANT TO PENAL CODE SECTION 1054.1**	87
A. Relevant Legal Principles	88
B. The Prosecutor's Notes Regarding Ray Muro	91

TABLE OF CONTENTS (continued)

Page

C. Detective Scott Walton's Opinion Regarding White Markings On Richard Rodriguez's Car 95

D. Detective Teague's Opinion Regarding The Direction The Shooter Was Facing When The Fatal Shots Were Fired 99

E. Measurements Taken Of Paul Escoto's Car 102

F. Investigation Notes Regarding J.P. Hernandez 105

G. Detective Walton's Opinions Regarding The Collision Between The Shooter's Car And Richard Rodriguez's Car 108

H. Oral Statement By Donna Tucker That She Was Threatened By The Verdugo Family 110

I. Notes Regarding Donna Tucker's Statement That Appellant Had Previously Worked On Other Vehicles 115

J. Information That Donna Tucker Was Given Witness Relocation Funds And Funds To Pay Rent 118

K. Appellant Suffered No Prejudice 121

IV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO QUESTION MARY ALICE BALDWIN REGARDING PSYCHIATRIC TREATMENT RECEIVED BY DONNA TUCKER 121

A. Relevant Proceedings At Trial 122

B. Relevant Legal Principles 124

TABLE OF CONTENTS (continued)

Page

C. Testimony From Mary Alice Baldwin Regarding Alleged Psychiatric Treatment of Donna Tucker Was Irrelevant And, Even If Relevant, Not So Vital To The Defense Case That Due Process Required Its Admission 125

D. Even If Error Occurred, No Prejudice Resulted 126

V. **APPELLANT WAS NOT ENTITLED TO HAVE THE JURY INSTRUCTED REGARDING VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE TO MURDER AS TO RICHARD RODRIGUEZ** 127

A. Relevant Proceedings At Trial 128

B. Relevant Legal Principles 128

C. There Was Insufficient Evidence Of Provocation From Richard Rodriguez To Justify Voluntary Manslaughter Instructions As To His Murder 130

D. Appellant Was Not Denied Due Process Within The Meaning Of *Beck v. Alabama* 132

E. Even If Instructional Error Occurred, Any Error Was Harmless 133

VI. **THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY REGARDING THE EFFECT OF VOLUNTARY INTOXICATION ON APPELLANT'S ABILITY TO FORM SPECIFIC INTENT** 133

TABLE OF CONTENTS (continued)

		Page
VII.	**THE JURY INSTRUCTIONS REGARDING CIRCUMSTANTIAL EVIDENCE WERE PROPER**	135
VIII.	**THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE**	138
	A. Relevant Proceedings At Trial	138
	B. The Trial Court Properly Responded To The Jury's Question Regarding The Meaning Of Life Without The Possibility Of Parole	139
IX.	**NO ERROR OCCURRED WITH RESPECT TO ADMISSION OF THE VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL**	143
X.	**APPELLANT HAS FAILED TO ESTABLISH THAT VICTIM IMPACT EVIDENCE MUST BE LIMITED TO FACTS OR CIRCUMSTANCES KNOWN TO HIM AT THE TIME HE COMMITTED THE MURDERS**	146
XI.	**THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR AT THE PENALTY PHASE TO CROSS-EXAMINATION OF WILLIAM WRIGHT REGARDING APPELLANT'S REPUTATION**	148
	A. Relevant Proceedings	148

TABLE OF CONTENTS (continued)

Page

B. The Trial Court Implicitly Found The Prosecutor Had A Good Faith Belief That Appellant Had Threatened Pauline 150

XII. THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY THAT AGE COULD ONLY BE CONSIDERED A MITIGATING FACTOR 152

A. Relevant Proceedings 153

B. The Prosecutor Was Entitled To Argue, And The Jury Was Entitled To Consider, Appellant's Age As An Aggravating Factor 154

XIII. THE PROSECUTOR DID NOT COMMIT *GRIFFIN* ERROR AT THE PENALTY PHASE OF THE TRIAL 157

A. Relevant Proceedings 157

B. Relevant Legal Principles 160

C. Waiver 161

D. Reversal Is Not Warranted Even If Trial Court Had Preserved The *Griffin*-Error Claim For Appeal 161

XIV. NO ERROR OCCURRED WITH RESPECT TO THE SCHEDULING OF THE DEFENSE CLOSING ARGUMENT AT THE PENALTY PHASE OF THE TRIAL 163

A. Relevant Proceedings 163

B. Waiver 166

TABLE OF CONTENTS (continued)

Page

C. No Abuse Of Discretion Occurred With Respect To Concluding The Court Proceedings On July 10 And Having Appellant's Trial Attorney Begin His Closing Argument The Following Morning 166

XV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL 168

A. Relevant Legal Principles 169

B. Appellant Has Failed To Show That A New Trial Was Warranted Due To His Aforementioned Claim That Donna Tucker Received Witness Relocation Funds And Had Psychiatric Problems As Well As His Aforementioned Claim That He Was Not Allowed To Fully Explain Why He Fabricated Evidence Of The Eyeglasses 169

C. Appellant Was Not Entitled To A New Trial With Respect To His Claims Regarding Donna Tucker's Feelings Toward Detective Markel And Her Feelings About Being Entitled To Reward Money 170

1. The New Trial Hearing 170

a. Evidence Regarding Donna Tucker's Feelings Toward Detective Markel 170

b. Evidence Regarding Donna Tucker Knowledge Of A Possible Reward 172

c. The Trial Court's Ruling 173

TABLE OF CONTENTS (continued)

Page

2. The Trial Court Properly Found That Donna Tucker Was Not Unfairly Biased, And Even If She Lacked Credibility, A Different Result At Trial Was Not Reasonably Probable 174

XVI. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO DISCHARGE TRIAL COUNSEL DURING THE NEW TRIAL MOTION 176

A. Relevant Legal Proceedings 177

B. Relevant Legal Principles 180

C. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Request Because It Was Untimely 181

XVII. APPELLANT'S CHALLENGES TO THE VALIDITY OF PENAL CODE SECTIONS 190, ET. SEQ ARE WITHOUT MERIT 182

XVIII. APPELLANT'S CONVICTION AND SENTENCE DO NOT VIOLATE INTERNATIONAL LAW 187

XIX. APPELLANT HAS FAILED TO DEMONSTRATE THAT ANY ERROR OCCURRED AT TRIAL 187

CONCLUSION 188

TABLE OF AUTHORITIES

Page

Cases

Abbott v. Mandiola
(1999) 70 Cal.App.4th 676 169

Beck v. Alabama
(1980) 447 U.S. 625
[100 S.Ct. 2382, 65 L.Ed.2d 392] 128, 132

Brady v. Maryland
(1963) 373 U.S. 83
[83 S.Ct. 1194, 10 L.Ed.2d 215] 87, 88

Chambers v. Mississippi
(1973) 410 U.S. 284
[93 S.Ct. 1038, 35 L.Ed.2d 297] 124

Chapman v. California
(1967) 386 U.S. 18
[87 S.Ct. 824, 17 L.Ed.2d 705] 133

Eddings v. Oklahoma
(1982) 455 U.S. 104
[102 S.Ct. 869, 71 L.Ed.2d 1] 156

Giglio v. United States
(1972) 405 U.S. 150
[92 S.Ct. 763, 31 104] 88

Griffin v. California
(1965) 380 U.S. 609
[85 S.Ct. 1229, 14 L.Ed.2d 106] 157, 160

Herring v. New York
(1975) 422 U.S. 853
[95 S.Ct. 2550, 45 L.Ed.2d 593] 166

In re Brown
(1998) 17 Cal.4th 873 88

TABLE OF AUTHORITIES (continued)

	Page
In re Littlefield (1993) 5 Cal.4th 122	100, 112, 116
In re Sassounian (1994) 9 Cal.4th 535	89, 92, 95, 97, 98, 101, 104, 107, 113, 119
Izazaga v. Superior Court (1991) 54 Cal.3d 356	89
Johnson v. Texas (1993) 509 U.S. 350 [113 S.Ct. 2658, 125 L.Ed.2d 290]	156
Kelly v. South Carolina (2002) 534 U.S. 246 [122 S.Ct. 726, 151 L.Ed.2d 670]	142
Kyles v. Whitley (1995) 514 U.S. 419 [115 S.Ct. 1555, 131 L.Ed.2d 490]	88
Payne v. Tennessee (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]	143, 145
People v. Arias (1996) 13 Cal.4th 92	183
People v. Ault (2004) 33 Cal.4th 1250	169
People v. Ayala (2000) 23 Cal.4th 225	90
People v. Babbitt (1988) 45 Cal.3d 660	124, 125
People v. Barton (1995) 12 Cal.4th 186	130, 131

	Page
People v. Beames (2007) 40 Cal.4th 907	146, 151, 168, 184, 185
People v. Bell (1998) 61 Cal.App.4th 282	91
People v. Bolden (2002) 29 Cal.4th 515	135
People v. Boyer (2006) 38 Cal.4th 412	185
People v. Boyette (2002) 29 Cal.4th 381	160, 162, 163, 185
People v. Bradford (1997) 14 Cal.4th 1005	137
People v. Bradford (1997) 15 Cal.4th 1229	137
People v. Breverman (1998) 19 Cal.4th 142	129, 130, 132, 133
People v. Brown (2004) 33 Cal.4th 382	145, 147, 186, 187
People v. Burgener (2003) 29 Cal.4th 833	170
People v. Carpenter (1997) 15 Cal.4th 312	90, 93, 97, 100, 104, 107, 109, 117
People v. Carter (2005) 36 Cal.4th 1114	137
People v. Coffman (2004) 34 Cal.4th 1	125, 160-162

TABLE OF AUTHORITIES (continued)

	Page
People v. Cole (1956) 47 Cal.2d 99	125
People v. Cook (2006) 39 Cal.4th 566	154, 182
People v. Cornwell (2005) 37 Cal.4th 50	82, 124, 125, 187
People v. Crittenden (1994) 9 Cal.4th 83	137, 160, 162
People v. Crovedi (1966) 65 Cal.2d 199	180
People v. Davis (1995) 10 Cal.4th 463	137
People v. Demetrulius (2006) 39 Cal.4th 1	133
People v. Ervin (2000) 22 Cal.4th 48	134, 135
People v. Farnham (2002) 28 Cal.4th 107	183
People v. Griffin (2004) 33 Cal.4th 536	182
People v. Harris (2005) 37 Cal.4th 310	187
People v. Hawthorne (1992) 4 Cal.4th 43	152, 154-156
People v. Holloway (2004) 33 Cal.4th 96	82, 124, 166

	Page
People v. Horton (1995) 11 Cal.4th 1068	135
People v. Hughes (2002) 27 Cal.4th 287	135, 161
People v. Jablonski (2006) 37 Cal.4th 774	150
People v. Jackson (1993) 15 Cal.App.4th 1197	90
People v. Jenkins (2000) 22 Cal.4th 900	183
People v. Jones (2003) 30 Cal.4th 1084	154, 183
People v. Kipp (1998) 18 Cal.4th 349	140-142
People v. Kipp (2001) 26 Cal.4th 1100	182
People v. Lara (2001) 86 Cal.App.4th 139	180, 181
People v. Lawley (2002) 27 Cal.4th 102	83
People v. Lewis (2001) 25 Cal.4th 610	135
People v. Lewis (2006) 39 Cal.4th 970	147, 186
People v. Logan (1917) 175 Cal. 45	129

TABLE OF AUTHORITIES (continued)

	Page
People v. Long (2005) 126 Cal.App.4th 865	125
People v. Lucky (1988) 45 Cal.3d 259	77, 155
People v. Manriquez (2005) 37 Cal.4th 547	128-131
People v. Marks (2003) 31 Cal.4th 197	84, 126
People v. Martin (2000) 78 Cal.App.4th 1107	134
People v. Medina (1995) 11 Cal.4th 694	186
People v. Melton (1988) 44 Cal.3d 713	186
People v. Memro (1995) 11 Cal.4th 786	161, 166
People v. Mendoza (1998) 18 Cal.4th 1114	134
People v. Mickey (1991) 54 Cal.3d 612	137
People v. Millwee (1998) 18 Cal.4th 96	137
People v. Mitcham (1992) 1 Cal.4th 1027	161
People v. Monterroso (2004) 34 Cal.4th 743	160, 162

TABLE OF AUTHORITIES (continued)

Page

People v. Morrison
(2004) 34 Cal.4th 698 184, 185

People v. Nakahara
(2003) 30 Cal.4th 705 183

People v. Nesler
(1997) 16 Cal.4th 561 169

People v. Ochoa
(1998) 19 Cal.4th 353 169

People v. Ochoa
(2001) 26 Cal.4th 398 182

People v. Ortiz
(1990) 51 Cal.3d 975 180, 181

People v. Panah
(2005) 35 Cal.4th 395 154

People v. Pinholster
(1992) 1 Cal.4th 865 91

People v. Pollack
(2004) 32 Cal.4th 1153 147

People v. Pride
(1992) 3 Cal.4th 195 169

People v. Ramirez
(2006) 39 Cal.4th 398 187

People v. Ramos
(1997) 15 Cal.4th 1133 124, 150

People v. Ray
(1996) 13 Cal.4th 313 137, 182

	Page
People v. Robinson (2005) 37 Cal.4th 592	143, 146, 147
People v. Rodrigues (1994) 8 Cal.4th 1060	84, 126
People v. Rogers (2006) 39 Cal.4th 826	132, 133, 183
People v. Roldan (2005) 35 Cal.4th 646	147
People v. Russell (1968) 69 Cal.2d 187	125
People v. Saille (1991) 54 Cal.3d 1103	134, 135
People v. Slaughter (2002) 27 Cal.4th 1187	154
People v. Smith (2007) 40 Cal.4th 483	184
People v. Snow (2003) 30 Cal.4th 43	140-142
People v. Stanley (2006) 39 Cal.4th 913	169
People v. Staten (2000) 24 Cal.4th 434	77, 78, 80
People v. Stitely (2005) 35 Cal.4th 514	147
People v. Superior Court (*Zamudio*) (2000) 23 Cal.4th 183	91, 93, 97, 101, 104, 107, 109, 113, 117, 119

TABLE OF AUTHORITIES (continued)

Page

People v. Turner
(2004) 34 Cal.4th 406 — 187

People v. Vargas
(1973) 9 Cal.3d 470 — 160, 163

People v. Vieira
(2005) 35 Cal.4th 264 — 183

People v. Watson
(1956) 46 Cal.2d 818 — 84, 91, 93, 97, 101, 104, 109, 113, 117, 119, 126

People v. Wickersham
(1982) 32 Cal.3d 307 — 129

People v. Williams
(1997) 16 Cal.4th 635 — 135

People v. Wilson
(1992) 3 Cal.4th 926 — 137

Roland v. Superior Court
(2004) 124 Cal.App.4th 154 — 100, 112, 116

Roper v. Simmons
(2005) 543 U.S. 551
[125 S.Ct. 1183, 161 L.Ed.2d 1] — 155, 156

Salazar v. State (Tex. Crim. App. 2002)
90 S.W.3d 330 — 145, 146

Schad v. Arizona
(1991) 501 U.S. 624,
[111 S.Ct. 2491, 115 L.Ed.2d 555] — 132, 133

Shafer v. South Carolina
(2001) 532 U.S. 36
[121 S.Ct. 1263, 149 L.Ed.2d 178] — 142

Page

Simmons v. South Carolina
(1994) 512 U.S. 154
[114 S.Ct. 2187, 129 L.Ed.2d 133] 138, 142

Stroud v. Superior Court
(2000) 23 Cal.4th 952 166, 167

Thompson v. Oklahoma
(1988) 487 U.S. 815
[108 S.Ct. 2687, 101 L.Ed.2d 702] 156, 157

Tuilaepa v. California
(1994) 512 U.S. 967
114 S.Ct. 2630, 129 L.Ed.2d 750 183

United States v. Agurs
(1976) 427 U.S. 97
[96 S.Ct. 2392, 49 L.Ed.2d 342] 88

United States v. Bagley
(1985) 473 U.S. 667
[105 S.Ct. 3375, 87 L.Ed.2d 481] 89, 92, 95, 97, 98, 101, 104, 107, 113, 119

Washington v. Texas
(1967) 388 U.S. 14
[87 S.Ct. 1920, 18 L.Ed.2d 1019] 83, 124

Constitutional Provisions

U.S. Const.,

5th Amend. 81, 87, 121, 128, 138, 143, 148, 152, 157, 160, 163, 168, 176, 182, 183, 186, 187

6th Amend. 81, 87, 121, 128, 138, 143, 148, 152, 157, 163, 168, 176, 182, 183, 186, 187

8th Amend. 81, 87, 121, 128, 132, 138, 143, 148, 152, 155, 157, 168, 176, 182, 183, 186, 187

14th Amend. 81, 87, 121, 128, 132, 138, 143, 148, 152, 157, 163, 168, 176, 182, 183, 186, 187

TABLE OF AUTHORITIES (continued)

	Page
Cal. Const.,	
art. I, § 7	81, 121, 128, 138, 143, 152, 157, 163, 168
§ 15	81, 87, 121, 128, 138, 143, 148, 152, 157, 163, 168
§ 16	81, 87, 121, 128, 138, 143, 152, 157, 163, 168
§ 17	81, 87, 121, 128, 138, 143, 148, 152, 157, 163, 168
§ 28	81, 121
Cal. Const.,	
art. VI, § 13	90, 169
Statutes	
Evid. Code § 352	82-84, 124
Evid. Code § 801	125
Evid. Code § 801, subd. (a)	125
Pen. Code § 187, subd. (a)	1
Pen. Code § 190.2	182, 185
Pen. Code § 190.2, subd.(a)(3)	1, 2, 185
Pen. Code § 190.3	143, 144, 147, 154, 182-185
Pen. Code § 190.3, subd. (a)	185
Pen. Code § 192	128
Pen. Code § 192, subd. (a)	129
Pen. Code § 987, subd. (d)	77, 80

	Page
Pen. Code § 1054.1	87, 89, 90
Pen. Code § 1054.1, subd. (b)	100
Pen. Code § 1054.1, subd. (e)	113, 119
Pen. Code § 1054.1, subd. (f)	97, 100, 112, 116
Pen. Code § 1054.5	90
Pen. Code § 1054.5, subd. (b)	90
Pen. Code § 1170, subd. (f)	185
Pen. Code § 1192.7, subd. (c)(1)	1
Pen. Code § 1192.7, subd. (c)(8)	1
Pen. Code § 1203.05, subd. (a)(1)	1
Pen. Code § 1239, subd. (b)	3
Pen. Code § 12022.5, subd. (a)(1)	1, 2

Other Authorities

CALJIC No. 2.01	135, 136
CALJIC No. 8.83	136
CALJIC No. 8.84	138

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **NATHAN JAMES VERDUGO,** Defendant and Appellant.	S083904 **CAPITAL CASE**

STATEMENT OF THE CASE

On November 29, 1995, an information was filed in the Los Angeles County Superior Court alleging that appellant committed two counts of murder (Pen. Code, § 187, subd. (a)). Both counts alleged that the murders were serious felonies (Pen. Code, § 1192.7(c)(1)). A special circumstance under Penal Code section 190.2, subdivision (a)(3) ("[t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree") also was alleged. (1 CT 234-237.)

The information subsequently was amended to add an allegation that as to the murders, appellant personally used a shotgun within the meaning of Penal Code sections 1203.05, subdivision (a)(1) and 12022.5, subdivision (a)(1). The personal use of the shotgun also made the charged murders serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(8). (1 CT 238-240.)

Jury selection began on August 26, 1996. (2 CT 395.)

On August 30, 1996, a mistrial was declared due to the arrest of appellant's trial counsel, George Hernandez. Hernandez agreed to submit to a medical examination and a physical examination. Appellant stated that he wanted Hernandez to continue to represent him. The court reset the trial as 0

of 60. (2 CT 400.) On September 4, 1996, the prospective jurors were dismissed and asked to return to the jury services office. (2 CT 401.) On October 11, 1996, after receiving the reports of Hernandez's examinations, the trial court found that Hernandez was competent to act as trial counsel for appellant. (2 CT 405.)

Jury selection began on May 12, 1997. (9 CT 2323.) After completion of the jury questionnaires, voir dire began on May 19, 1997. On May 20, 1997, the twelve jurors and six alternates were impaneled. (9 CT 2324-2327.)

The prosecution and defense made opening statements on May 21, 1997. (9 CT 2332.) The prosecution rested its case, and the defense commenced its case, on June 18, 1997. (9 CT 2414.) On June 25, 1997, the defense rested, the prosecution presented its rebuttal case, and the prosecution began argument. (9 CT 2419.) Closing arguments for both parties were completed on June 26, 1997. (9 CT 2420.) On June 30, 1997, the trial court instructed the jury and the jury deliberations began. (9 CT 2421.)

On July 2, 1997, the jury reached its verdict. The jury found appellant guilty of two counts of first degree murder. As to both counts, the jury found true the firearm-use allegation pursuant to Penal Code section 12022.5, subdivision (a)(1). The jury also found the special circumstance allegation pursuant to Penal Code section 190.2, subdivision (a)(3), to be true. (9 CT 2423; 10 CT 2515-2517, 2529.)

The penalty phase of the trial began on July 3, 1997. The prosecutor and the defense made opening statements. (10 CT 2530.) On July 9, 1997, the prosecution rested its case, and the defense presented its case. (10 CT 2533.) The prosecution presented its argument on July 10, 1997. (10 CT 2534.) On July 11, 1997, the defense presented its argument, the trial court instructed the jury, and the jury began deliberations. (10 CT 2535.)

On July 14, 1997, the jury found that the penalty should be death. (35 RT 6343.)

On November 19, 1999, the trial court denied the motion to reduce the verdict of death to life without the possibility of parole. The judgment of death was filed by the trial court on the same day. (11 CT 2965-2978.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILTY PHASE

A. Prosecution Case-In-Chief At The Guilt Phase

1. Party At The Home Of Hector Casas

On October 22, 1994, a party was held at the home of Hector Casas on Parrish Avenue in Glassell Park. (7 RT 1240, 1250-1251.) The party started at approximately 8:00 p.m. (7 RT 1254.) Mario Rodriguez also was a host of the party. He invited his sister Frances Rodriguez to attend along with friends and other people he knew. Additionally, he told Frances to invite some of her own friends. (7 RT 1277-1278; 8 RT 1316.) Frances Rodriguez invited some of her friends to the party. Among these friends were Yolanda Navarro, Richard Rodriguez ("Richard"), Lisa Ruvalcaba, and Adrianna Castellanos. (8 RT 1316-1317, 1319.) Richard drove to the party with Yolanda ("Navarro"), Adrianna Castellanos, and Lisa Ruvalcaba as his passengers. (7 RT 1254; 8 RT 1321-1324; 9 RT 1481.)

Appellant attended the party. Hector Casas and Mario Rodriguez did not know appellant, and they did not invite him to the party. During the party, appellant was in the kitchen with Mike Arevalo, Ray Muro, and Paul Escoto.[1]

---

1. Paul Escoto, however, testified that he did not remember seeing appellant there. (9 RT 1549-1550.)

(7 RT 1253, 1280-1281; 8 RT 1327-1328; 9 RT 1549-1550, 1545, 1547, 1549, 1637, 1640.) Mike Arevalo and Muro arrived at the party sometime after 9:00 p.m. Mike Arevalo saw appellant at the party. (9 RT 1633-1634; 10 RT 1891-1893.) Appellant [2] wore a light blue shirt and eyeglasses.[3] Ray Muro wore Marine fatigues. Mike Arevalo wore a Rolling Stones shirt. Paul Escoto wore a blue shirt. Appellant, Muro, Escoto, and Mike Arevalo were drinking during the party and they were laughing with each other. (7 RT 1259, 8 RT 1327-1329, 1390, 1392, 1401, 1415; 9 RT 1483, 1531, 1635-1637, 1639-1640, 1644; 10 RT 1894-1896; 11 RT 1957-1958.)

During the party, Kevin Estrada, one of the guests, turned off the kitchen light to scare another party guest. Esteban Garcia was walking through the kitchen when the light was turned off. When Kevin turned the light back on, Paul Escoto was holding Esteban up against a wall with both hands grabbing Esteban's neck. Escoto was over 6 feet tall and appeared to weigh about 250 pounds. Kevin tugged Escoto's shirt so he would turn around. Escoto turned and grabbed the mask of Kevin's costume. Mike Arevalo approached and separated them. Ray Muro and appellant were in the kitchen at this time. (8 RT

---

2. Adrianna identified appellant as one of the men in the kitchen. At the time of her testimony, she said that appellant looked to be about the same height as did at the party, but he did appear to be heavier than he was at the party. (9 RT 1533.)

3. Jason Borens was a guest at the party. He videotaped parts of the party. After the murders, he was contacted by detectives who requested a copy of the videotape. He gave them a copy of the videotape. (7 RT 1293-1294.) The videotape was played for the jury. (7 RT 1296, 1303; 8 RT 1314-15.) On October 27, 1994, during a police interview, Mike Arevalo was shown the videotape. He identified Ray Muro and Paul Escoto on the tape, but denied knowing who appellant was. In a subsequent interview with the police, Mike Arevalo admitted that he knew appellant. Mike Arevalo also admitted having lied about not being able to identify appellant on the videotape. (16 RT 2949, 2956, 2958-2959, 3042-3044; 17 RT 3124.)

1383-1384, 1388-1394, 1415, 1430-1435; 9 RT 1550-1552, 1644.)

After Mike Arevalo separated them, they all agreed to make peace. Kevin had never before seen Mike Arevalo, Paul Escoto, or appellant. Kevin went to the balcony and got several beers. He took one for himself, and gave the others to Esteban, Mike Arevalo, and Paul Escoto. (8 RT 1394-1395.) Esteban noticed that Escoto gave him intimidating looks. (8 RT 1438.)

At some point during the party, Yolanda, Adrianna, Lisa, Kevin, Richard, and Esteban went outside to look for two guests who had left without telling anyone. (8 RT 1330-1331, 1396-1398, 1438; 9 RT 1486, 1488.) As they walked, Kevin saw Paul Escoto and Monica Tello entered a light colored car. (8 RT 1395-1396.) Yolanda and Adrianna were walking behind Kevin. (8 RT 1398.) As Escoto left, he drove fast and his car hit Adrianna on the hip. Escoto did not stop. The car drove up a hill. (8 RT 1440.) Kevin heard one of the girls scream that a car had just hit Adrianna. The car was now approaching Kevin. He threw a can of beer at the car, but the car continued driving away. (8 RT 1398-1399.) The car eventually turned and drove back down the hill. (8 RT 1441.)

Paul Escoto did not hear anything as he drove away, but later learned that he had hit someone with his car. (9 RT 1554.) Tello heard a thud as they passed the group. (9 RT 1586, 1597-1598.) The group helped Adrianna get back to Casas's home. (8 RT 1440.) Richard carried her down the hill to the house. (8 RT 1332; 9 RT 1488.)

Mario Olmos heard that a girl had been hit by a car, but that she did not appear to be injured. However, the girl was acting hysterically. Adrianna was taken to downstairs room in the house. Frances, Yolanda, and others attended to her. Richard eventually came to the room and walked Frances upstairs. Paramedics arrived and treated Adrianna. (7 RT 1282-1284; 8 RT 1332-1335; 9 RT 1488-1489, 1607-1613.)

When Esteban returned to the party he found Mike Arevalo. He said that Arevalo's friend hit Esteban's friend with his car. Then, Lisa came from an area that Arevalo could not see and hit Arevalo with a bottle. She screamed, "You fucking asshole. Your friend hit my friend with the car. He ran them over." He was struck three times, once on the forehead, once on the bridge of his nose, and once on his lower lip. Havoc ensued. People tried to hold Mike Arevalo back from attacking. He was upset and bleeding. Arevalo remembered saying something like "I'm going to kill you" to anyone in his way. (7 RT 1277-1279; 8 RT 1441, 1444-1445; 9 RT 1644-1649; 10 RT 1875.) Kevin heard Arevalo screaming, "Fucking bitch." Arevalo was trying to climb over the crowd that was holding him back. Somebody in the crowd yelled, "Shoot the bitch." (8 RT 1401, 1411, 1427.)

Esteban took Lisa outside. Mike Arevalo's aunt, Irma Casas, told Lisa that she had just hit her nephew. Esteban and Kevin shielded Lisa from the woman. Mario came outside and told Esteban and Lisa to leave. He also told them, "You guys go home. You know they got guns here." As they left the party, Esteban did not see Yolanda or Richard. (8 RT 1402-1404, 1443-1445; 10 RT 1825-1827.)

Ray Muro was outside the house when he heard that Mike Arevalo had been hit with a bottle. For approximately fifteen minutes, Muro tried to reenter the home. At one point, appellant came outside and ran to his car. Appellant's car was a black Honda CRX. Muro followed appellant to his car. (10 RT 1897-1899; 16 RT 2937-2946.) Appellant opened the trunk and showed Muro a shotgun. The shotgun was similar to the one that was subsequently found inside the home of appellant's brother Michael Verdugo and his wife Donna[4].

---

4. At the time of trial, Donna and Michael Verdugo had separated and she was known as Donna Tucker. (21 RT 3960; 22 RT 4147, 4216.) Hereinafter, she will be referred to as "Donna" or "Donna Tucker."

It was similar in color. However, the barrel of the shotgun found in the home of Michael Verdugo and Donna Tucker was "a little bit" shorter than the shotgun Muro saw in appellant's car. (10 RT 1899; 11 RT 1946, 1948-1949, 1976; 17 RT 3188; 21 RT 4022-4023.) The shotgun was small and appeared to look modified. It had pump action and a pistol grip. (10 RT 1900; 11 RT 1948-1949, 2009-2014.)

Appellant told Ray Muro either that he was going to go back in and "get those people" or that "I'm going to go get that girl." Muro told him to calm down and that there was "no need for that." He told appellant to put the shotgun away. Muro was trying to defuse the situation. (10 RT 1899, 1902; 11 RT 1977.) When appellant took out the gun, he appeared to be a different person, a "Dr. Jeckyl [sic] and Mr. Hyde type." Until then, appellant always seemed like a "normal, decent person" who did not "exhibit any type of violent behavior." (10 RT 1901.) Appellant then put the shotgun away. (10 RT 1902; 11 RT 1977.) After putting the shotgun away, appellant and Muro went back to the house. The paramedics had arrived. The door opened and Muro saw that Mike Arevalo was "pretty banged up." (10 RT 1902.) Hector Casas saw Mike Arevalo in a bathroom bleeding from the face down. Mike Arevalo said that a girl that he did not know had hit him with a bottle.[5] (7 RT 1255, 1257.)

Eventually, the police arrived at the party. While the police were there, Irma, appellant, and others informed the police about what happened to Mike Arevalo. Irma asked appellant to take her to the hospital where Arevalo was going to be taken. They stayed outside Hector Casas's house for a while

---

5. When Paul Escoto returned to the party, he saw Mike Arevalo running down the hill with blood on his face. He followed Mike Arevalo to the home of Arevalo's aunt, Stella Casas, who lives nearby. When Escoto and Tello arrived, Mike Arevalo was lying on the stairs. Arevalo eventually was taken to Glendale Memorial Hospital. Appellant did not go to the hospital. (7 RT 1241; 9 RT 1555-1556, 1650-1656; 10 RT 1862-1865.)

longer, and then Irma went back inside the house for fifteen to twenty minutes. When she went outside again, appellant was gone. She did not see him the rest of the evening. (10 RT 1827-1840.)

Carmel Casas, another aunt of Mike Arevalo, was at the party. After Arevalo was hit by the bottle, she drove her car to the front of the house to wait for her husband, Victor, Mike Arevalo's uncle. While she waited, the police arrived and an ambulance arrived. A car drove in behind hers. She believed that she would not be able to leave. She went to the driver of the car and asked him to move. The driver was appellant, and he was in a small black car. He wore a blue shirt and eyeglasses. He backed up and made a U-turn. When she left, appellant's car was parked, and he was leaning against it. (10 RT 1860, 1877-1880, 1883-1884, 1888-1889.)

When Adrianna and Yolanda finally went outside, a woman yelled at them. Eventually, Richard Rodriguez arrived with his car. He asked Adrianna and Yolanda to get into the car. Adrianna got into the back seat and Yolanda got into the front seat. Adrianna then turned and saw her sister's Jeep. She told Richard that she would ride with her sister. She got out of the car and into her sister's Jeep. (9 RT 1492-1496.) When Richard returned to his car, a small, dark "Honda-sized car" pulled out behind them and followed them. (9 RT 1497.) The car was of the same style as appellant's Honda CRX. (9 RT 1498.) The car cut in front of the car driven by Adrianna's sister and right behind Richard's car. (9 RT 1497-1498, 1536.)

2. The Shooting Near The Fire Station

On the evening of October 22, 1994, Alex Quintana, an engineer for the Los Angeles City Fire Department, and Donald Jones, a firefighter, were assigned to Fire Station 47 in El Sereno, California, near the intersection of Huntington Drive and Monterey Road. At approximately 2:00 a.m., Jones and

some other firefighters returned to the station. Quintana heard "a lot of voices outside the window" of the station. Jones believed an argument was occurring and the voices got louder and louder. (12 RT 2062-2063, 2123-2126.) Quintana also heard footsteps and the sound of somebody running. (12 RT 2064-2065.) Next, Quintana heard a "blast" that sounded like a shotgun being fired. (12 RT 2066.) Approximately ten seconds later, Quintana heard two more shotgun blasts. The second and third shotgun blasts were approximately three to five seconds apart. (12 RT 2066-2067.) Next, Quintana heard a woman saying "No, no, please don't do it. Please, please don't." (12 RT 2067.) Jones also heard the three shotgun blasts followed by a girl saying "no, no." (12 RT 2126-2127.) There was a tone of panic in her voice. After five or six seconds of pleading, he heard one more shotgun blast. (12 RT 2068.)

Quintana looked out the window and saw a man holding a shotgun and standing over a girl. He did not see the shooter's face. The shooter held the shotgun in his right hand and held his left hand on the stock of the shotgun. The shooter was pointing the gun at the girl's head. The girl was not holding a weapon. The shotgun was approximately six to twelve inches from the girl's head. Quintana saw the shooter chamber another round into the shotgun and shoot the girl in the head.[6] The chambering of that round sounded like pump action. Quintana could only see the barrel and slide of the gun. He could not see the butt end. It was a dark shotgun. The girl was lying face down on the sidewalk when he fired the last shot. The shooter ran back to his car, and the shooter did not stop to pick up anything from the ground. Quintana could not see the shooter enter the car because a fence obstructed his view. Next, Quintana saw a black car driving on Monterey toward Huntington. (12 RT 2069-2072, 2086, 2089-2090, 2092, 2099, 2110-2111, 2114, 2129-2132,

---

6. Jones did not see any of the shooting. Quintana, however, already was looking out the window when Jones first looked out. (12 RT 2156, 2176.)

2208.)

The shooter's car was a black Honda with tinted windows and a louvered back window. The car had a modified exhaust system. Quintana believed that the exhaust system was modified because the muffler sound was loud. Jones described the muffler sound as loud and low.[7] (12 RT 2072-2073, 2119, 2145-2146, 2203.)

When Jones looked out of the window, he saw someone standing on the street near the sidewalk. The person held what appeared to be a shotgun rather than a pistol. The person was facing the fire station for a few seconds. The person stood near a male victim who was lying in the gutter. The female victim, later identified as Yolanda,[8] was lying on the sidewalk. Jones estimated that the shooter was approximate twenty to twenty-five years old. (12 RT 2128-2129, 2136, 2139-2140, 2142, 2176-2177, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319.)

After discussing what kind of car was seen, the firefighters drove fire engines out to block the street. After blocking the street, they went to Yolanda. A man, later identified as Richard Rodriguez, was found lying in the gutter further up the street on Monterey. Both Yolanda and Richard were dead. A red sedan, later identified as belonging to Richard, was parked at the light on Monterey and Huntington Drive. The sedan was still running and its lights and radio were on. (8 RT 1323; 12 RT 2073-2075, 2077-2078, 2080-2081, 2090, 2133-2135, 2147; 13 RT 2266-2294.) There was brain matter spread out all over the area. There also were shotgun shells and a pager. (12 RT 2078, 2082;

---

7. Mike Arevalo testified that appellant's Honda CRX was painted black had a modified muffler and had a lower tone. (9 RT 1619-1621, 1624, 1626-1632.)

8. Yolanda is about the same height and build as Lisa Ruvalcaba, the girl who hit Mike Arevalo with the bottle. Lisa and Yolanda had the same hair color and were both Mexican-American. (8 RT 1319-1320.)

14 RT 2630-2632, 2635-2650, 2668-2689.) Quintana did not see any weapon near Richard's body, and when Quintana saw the shooting, he did not see Richard holding a weapon. (12 RT 2089-2090.)

Approximately one car length behind Richard's car, Jones found a pair of eyeglasses on the ground. He did not touch the eyeglasses. The eyeglasses were wire-rimmed and the frames were clear.[9] The glass was clear. The eyeglasses had gold rims and were slightly bent. (12 RT 2135, 2183; 14 RT 2631-2632, 2638, 2670-2671.) Jones stayed near the eyeglasses to make sure that nobody touched them. When the first police officer arrived, Jones pointed them out to the officer. (12 RT 2146-2147, 2183.)

While the firefighters were blocking the street, a man wearing a Raiders jacket, later identified as Yolanda's brother, Jonathon Rodriguez, came across the street. He said that he thought the girl was his sister. While some of the firefighters remained at the crime scene, Jonathon and other firefighters went to the station to call Jonathon's mother. Jonathon asked his mother to page Yolanda. When Jonathon hung up the phone, he and the firefighters went outside to Yolanda. There was a pager lying on the ground next to her that was vibrating. Quintana told Jonathon to get behind the fire tape that had been set up.[10] (12 RT 2074-2077; 13 RT 2433, 2438-2441.)

On the night of the shooting, Quintana told the officers that the shooter was dark-skinned. The shooter appeared to have darker skin color than

---

9. Jones said that the eyeglasses that were People's Exhibit 58 looked similar to the eyeglasses that he saw. (12 RT 2149.)

10. Jonathon was near the fire station located on Monterey Road and Huntington Drive walking to a friend's house. He heard three gunshots. The first shot was a little faint. The second shot was a little louder. The third shot was very loud. The gunshots came from the bottom of the hill near the fire station. Jonathon walked down the hill, but he was afraid of getting shot. (13 RT 2434-2437.)

appellant had in the light of the courtroom. The streetlight may have affected Quintana's ability to perceive. Additionally, Quintana did not see much skin of the shooter. Quintana was guessing about the color of the shooter's skin from the color of his hair. (12 RT 2098-2099, 2104-2105, 2115, 2117-2118.)

Quintana described the shooter as having short hair and it was clean-cut.[11] He was dressed nicely. He weighed approximately 155 pounds, average weight, not heavy or thin. Quintana did not notice if the shooter had eyeglasses on. Quintana also estimated that the shooter was between 5 feet 10 inches and 6 feet 2 inches, but could only estimate because of the angle at which he saw the shooter. The shooter's shirt had a bronze tone or copper color, and black pants. The shooter did not have a hat or cap on. (12 RT 2083-2086.)

Jones told officers later that he estimated the shooter's height as 5 feet 9 inches or 5 feet 10 inches tall, but that it was difficult to give an estimate of the person's height because Jones was looking from a second story window. The person weighed approximately 160 to 170 pounds. The person had dark hair that was "very clean cut." The person did not have a beard or mustache. The person was light complected. The person was either White or Hispanic, but later he told an officer that the person was a male Hispanic. The person wore a blue, long-sleeved button-down shirt. He also wore white pants. (12 RT 2143-2144, 2159, 2163-2164, 2179, 2194-2195, 2205-2206, 2210-2211, 2214-2216.)

Jones subsequently went to a police station and was shown a videotape of the party. He identified a person standing in a kitchen area, later identified as appellant, as the person he saw outside the window of the fire station. The person on the videotape had the same hair, complexion, shirt, pants, and size as

---

11. Quintana also said that the clean-cut quality of the hair was similar to that depicted in People's Exhibit 26, which depicted appellant as he was dressed at the party that night. (10 RT 1895; 12 RT 2085-2086.)

the person outside the window. The eyeglasses worn by the person on the videotape were similar to the ones Jones saw on the street. (10 RT 1895; 12 RT 2148-2152, 2186-2188.) Jones identified appellant as resembling the person he saw outside the fire station window. (12 RT 2153-2154.)

3. Autopsy Evidence

Dr. Lee Bockhacker, deputy medical examiner for the Los Angeles County Coroner's Office, performed the autopsies on Richard Rodriguez and Yolanda Navarro. Richard suffered a gunshot wound to the back of his the head. The entrance wound was one and one-half by one and one-half inches in size. The wound had scalloping in the margins and no soot or stippling. There were radial tears around the wound. There was no separate exit wound. The entrance and exit wound were one in the same. The pellets from the shot went into the brain and most of the pellets went right out again. Rodriguez's skull was fractured. This was a fatal gunshot wound because of the massive injury to the brain. The wound was consistent with Richard being on his hands and knees when being shot, and the shooter firing down at the victim from behind and to the right. The barrel of the gun was approximately two feet, but no greater than four feet away from the victim. (13 RT 2266-2275, 2294.)

Richard had a second gunshot wound in the back of the left thigh. The entrance wound was five-sixteenths by one-eighth inch. This gunshot wound fractured Richard's femur. There was an exit wound on the front of Richard's thigh. This gunshot wound to the thigh was not fatal. However, Richard would not have been able to stand for long after receiving the wound. It would have been very difficult to run with the wound because no weight could have been put on the leg with the fractured femur. This wound is consistent with someone running away from the shooter at the time of the shot. (13 RT 2276-2279.)

A third gunshot wound was found on the sole of Richard's left foot. The bullet went through the shoe on that foot. There was no soot or stippling on the wound. This wound, which was not fatal, also was consistent with the victim running away from the shooter at the time of the shot. (13 RT 2279-2282.)

The fourth gunshot wound was to the back of Richard's left thigh. This wound was not fatal and there was no exit wound or any soot or stippling. A portion of a shotgun pellet, five-sixteenths in diameter, was recovered in the soft tissue in the left knee area. The wound also was consistent with the victim running away from the shooter at the time of the shooting. (13 RT 2282-2284.)

Dr. Bockhacker opined that Richard could have received the second, third, and fourth gunshot wounds and could still have been able to crawl. It also was possible that the second, third, and fourth gunshot wounds were all received from a single gunshot. Richard had scrapes and bruises on his face, injuries on his hands, and scrapes on his knees. The injuries to the hands and the scrapes to the knees were caused by falling forward to the ground and consistent with crawling on the ground. The scrapes on Richard's face were consistent with him falling to the ground and hitting the pavement. One bruise to the left upper eyelid was probably due to the gunshot wound to the head. (13 RT 2284-2285, 2287-2293.)

No drugs or alcohol were detected in Richard. (13 RT 2293.) The cause of death was the gunshot wound to Richard's head. (13 RT 2294.)

Yolanda Navarro had only a single gunshot wound to the back of her head. The entrance wound was to the back of the head. She had an exit wound through the face. No soot or stippling were found. Scalloping was found. The entrance wound was six and one-half by one and one-half inches. The barrel of the gun was approximate two to four feet from the victim's head when the

shot was fired. Some wadding also was found in Yolanda's brain tissue. Three fragments of blood-soaked wadding were recovered from Yolanda's brain. The wound was fatal. The wound was consistent with the victim being down on her knees, almost to the ground, with her head close to the ground, but off the ground, and the shooter firing from behind the victim. (13 RT 2298-2304, 2309.)

Yolanda also had four abrasions on the back of her left upper arm, elbow, and forearm. There were scrape marks on the right arm as well. The injuries were consistent with Yolanda falling and hitting asphalt or a concrete surface. She would have had to have her hands behind her head as she hit the ground to have these abrasions and scrapes. (13 RT 2309-2312.)

Yolanda also had five scrape marks on her right knee and three scrape marks on her left knee. The marks are consistent with her having fallen over a curb and hitting the pavement. There also were scrape marks on her feet. The marks are consistent with her having hit a pavement surface. (13 RT 2313, 2315-2316.)

There were no defensive wounds on Yolanda. Her blood alcohol level was 0.111 percent. Under the California Vehicle Code, anything over 0.08 percent is considered under the influence. Dr. Bockhacker opined that Yolanda died from the gunshot wound to the head. (13 RT 2316-2317, 2319.)

4. Appellant's Activities Following The Shooting And The Next Morning

After being treated for his injury,[12] Mike Arevalo returned to his father's

---

12. Mike Arevalo began receiving treatment for his injuries at 1:17 a.m. on October 23, 1994 at the emergency room of the Glendale Memorial Hospital. He was discharged sometime between 2:20 and 2:40 a.m. (17 RT 3287-3298.)

home in Alhambra with his father, his father's girlfriend, and Ray Muro. Appellant was waiting at Arevalo's father's home when the arrived. Appellant and Mike Arevalo talked briefly outside. Mike Arevalo could not remember whether appellant hugged him or talked to him at that time. Mike Arevalo also did not remember whether appellant told him that he had killed two people or had run someone off the road. (9 RT 1658-1661, 1697-1698; 10 RT 1736-1737, 1907-1908; 11 RT 1983-1985.) Muro heard appellant say to Mike Arevalo that the "situation had been handled," and then they embraced. (10 RT 1909-1910; 11 RT 1993-1994.) Appellant was not wearing his eyeglasses from earlier in the evening.[13] (11 RT 2020.)

The next morning, Mike Arevalo went to breakfast with appellant and Ray Muro at a restaurant in Alhambra. Appellant wore black Rayban sunglasses with black, tinted lenses. At one point, Mike Arevalo's mother arrived, took Arevalo outside the restaurant, and told him that a man and a woman from the party the night before had been shot and killed. (9 RT 1675-1678; 10 RT 1734-1735, 1911-1912, 1914-1915.) Mike Arevalo then went back inside the restaurant and told appellant and Ray Muro what had happened. When they left the restaurant, Arevalo did not see where appellant went. Muro did not see appellant again. (9 RT 1679; 10 RT 1735, 1753; 10 RT 1916.)

5. The Eyeglasses Recovered At The Scene Of The Murder

On November 24, 1993, appellant purchased a pair of eyeglasses from LensCrafters in Monrovia. Appellant purchased the eyeglasses after having received a routine eye examination. The eyeglasses were from the "University" line and the frames were known as "University Semester 14 Model Frame."

---

13. Appellant testified that he slept that night at Ray Muro's house which is next door to the home of Mike Arevalo's father. (24 RT 4550-4551.)

The frames also are known as tortoise and gold. These were the eyeglasses found at the murder scene. (14 RT 2581-2597, 2638, 2670-2671, 2708-2723, 2729; 16 RT 2935, 2945, 2948, 2969, 3010-3011; 18 RT 3538.)

On November 12, 1994, appellant went to the office of Dr. Richard Shuldiner, an optometrist, for an examination. Appellant explained that he had lost his eyeglasses. (13 RT 2395-2405.)

After appellant's arrest in April of 1995, his brother, Paul Verdugo [hereinafter "Paul"], testified that he had found a pair of eyeglasses in their home in Rialto.[14] The eyeglasses were on the refrigerator in the house. He put them on a shelf in his bedroom and left them there for two years until he had gave them to a defense investigator who delivered them to court. Paul testified that these were the eyeglasses shown being worn by appellant in the newspaper articles about the case. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877.) Keith Nakao, an optician for LensCrafters, opined that the eyeglasses found by Paul appeared to be more worn than the eyeglasses found at the scene of the murder. However, he explained that it is easy to scratch them to make them seem more worn. (14 RT 2618-2619.)

The frames of the eyeglasses found by Paul and the frames of the eyeglasses found at the scene of the murder were both University Collection, Semester 14 frames. Records from LensCrafters showed that on March 16, 1996, Sal Verdugo [hereinafter "Sal"], appellant's father,[15] purchased eyeglass frames from the University Collection, Semester 14 line. The transaction was in cash. Records from LensCrafters show that on March 18, 1996, Paul

---

14. These eyeglasses were identified as Defense Exhibit B. (18 RT 3538-3539.)

15. Sal was granted use immunity for his testimony. (20 RT 3809, 3828.)

purchased lenses in appellant's prescription that were cut for University Collection, Semester 14 frames. (23 RT 4304-4313, 4322–4328.)

Detective John Spreitzer of the Los Angeles Police Department went to execute a search warrant at the Verdugo residence in Rialto on the day appellant was arrested. An officer pointed out a location in the kitchen area where there was a fanny pack and two weapons. The fanny pack was on top of the refrigerator and it had two weapons - a nine millimeter and a .380 caliber automatic. There were no eyeglasses on the refrigerator. Although he was not specifically looking for eyeglasses, Detective Spreitzer knew that eyeglasses were important to this case. He had looked in the area on top of the refrigerator and in the box that was located there. (23 RT 4298-4303.)

6. Firearm And Ballistics Evidence

In September of 1990, appellant purchased two .12 gauge shotguns at a Big 5 Sporting Goods store in Pasadena. The barrels of the shotguns were eighteen and one-half inches long. The serial numbers were K677392 and K677401. (15 RT 2736-2738, 2740-2743.)

On April 16, 1992, Officer Benjamin Lopez of the Los Angeles Police Department responded to a call at 3832 Hellman Avenue in Los Angeles, at 7:00 p.m., regarding a burglary. Appellant and his brother were the reporting parties. Officer Lopez identified appellant in court. Appellant told Officer Lopez that someone had stolen his two shotguns.[16] The last time he had seen his shotguns was on April 13, 1992, at 3:00 p.m. He had cleaned them and put them in a case. He had placed them under a bedroom window. When he returned on April 15, 1992, at 8:00 a.m., he noticed that the case was ajar. The shotguns missing were Mossberg blue steel shotguns with black, plastic stocks.

---

16. During his own testimony at the trial, appellant admitted that he owned two shotguns. (24 RT 4536.)

The serial numbers were K-677392 and K-677401. Officer Lopez completed and filed the report. (15 RT 2834-2839.)

On January 17, 1993, Officer Diana Morales of the Los Angeles Police Department went to 1500 North Main in response to a call that shots were fired. As she began walking to the apartment complex at that address, she saw a male look in her direction. The male was 5 feet 7 inches tall, wore a baggy white T-shirt and baggie jeans. The male threw something down and started running. The object that was thrown down was a black, .12 guage Mossberg shotgun with pistol grips. Officer Morales identified the shotgun found inside the home of appellant's brother Michael Verdugo and his wife Donna Tucker as being similar to the shotgun she recovered, but she believed that the barrel on the shotgun she recovered was shorter than the one at trial. However, the color of the shotgun was the same, and it too had a pistol grip and pump action. She booked the shotgun into evidence. The serial number of the shotgun that she recovered was K-677401. (11 RT 1948; 15 RT 2840-2844.)

On January 28, 1993, Officer Kelli Holmes of the Los Angeles Police Department released the shotgun to appellant at Parker Center. The shotgun would not have been released if it had a sawed-off barrel because such a weapon would be illegal. (15 RT 2846-2852.)

Richard Maruoka, a criminalist assigned to the Firearms Analysis Unit of the Los Angeles Police Department examined fired .12 gauge shotgun shells and shot shell components, including pellets and wadding, that were found at the scene of the murders. He also examined two .12 gauge shotguns. He determined that the brand of shells were Fiocchi and the shells were fired from one firearm. Lead pellets or fragments, consistent with such material from Fiocchi shell, were removed from the body of Richard Rodriguez. He determined that the shotgun belonging to appellant that was found in the home of Michael Verdugo and Donna Tucker was not the weapon that fired the

shells. He also determined that a shotgun found during a police search of appellant's home in Rialto on December 7, 1994, was not the weapon that fired the shells. (14 RT 2635-2650, 2668-2689; 16 RT 2911-2913, 2916, 2919-2922, 2926-2928, 2932-2935.)

7. Evidence Regarding Appellant's Honda CRX

Detectives Andrew Teague and Charles Markel of the Los Angeles Police Department, the lead detectives on the case, inspected the scene of the murders and found skid marks on the roadway. Detective Teague believed that the skid marks were acceleration marks from a front-wheel drive vehicle.[17] (15 RT 2797-2803.)

Sal[18] testified that he had sold the CRX to a man named Manual Ortiz, but he could not remember when the sale occurred. Ortiz eventually returned the CRX. (20 RT 3830, 3834.) Sometime prior to the sale, the front fender and the hood of the CRX had to be repaired. (20 RT 3767-3768, 3771-3787.) In November or December of 1994, Daniel Cuevas met with appellant, Paul, and Sal to take them to a body shop[19] to have appellant's CRX painted. The body shop was owned by Jesus Maldonado. Cuevas is a brother-in-law of Sal. At

---

17. Detective Markel measured the wheel base of the front wheels on appellant's car and found it to be 4 feet 9 inches. The acceleration marks found at the crime scene also were four foot nine inches. (17 RT 3190-3191, 3193.)

18. Sal was the registered owner of the CRX, but appellant was allowed to drive the car. (14 RT 2665; 18 RT 3516; 20 RT 3763-3765; 23 RT 4375.) Donna Tucker, appellant's sister-in-law, testified that Sal bought the CRX for appellant and that appellant was the only one who would drive it. (21 RT 3968.)

19. Cuevas said that the body shop was the Los Compadres Body Shop in Montclair. Maldonado, the owner of the shop, said that Cuevas brought them to his shop called Los Compas Body Shop in Ontario. (15 RT 2858; 16 RT 2889-2901.)

the time, appellant's CRX was painted a dark gray "primer" color. The car was painted yellow. Sometime after appellant's CRX had been left at the shop, Cuevas received a total of four or five telephone calls from the shop informing him that the car was ready to be picked up. After receiving each call, Cuevas telephoned the Verdugo family to tell them about the car. Cuevas spoke to Paul on each of these occasions. Maldonado and one of his employees said that the CRX was missing two or three pieces of molding. The pieces of molding were in the trunk of the car. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910; 20 RT 3707; 30 RT 3791.)

Sal never picked up the CRX from the shop because the police impounded it. (20 RT 3838-3841.) Detective Teague examined the CRX and found that it was a front-wheel drive vehicle. (7 RT 1236-1237; 15 RT 2797-2805.)

The CRX was inspected by Los Angeles Police Department Detective Charles Scott Walton of the Specialized Collision Investigation Detail. He also inspected Richard Rodriguez's car. He inspected the vehicles to determine whether they could have come together. Appellant's CRX had had body work done recently and had been freshly painted. Various parts of the car did not align properly. A piece of molding was missing. Fresh paint was in areas where it was not supposed to be, such as the wheel well and the license plate, and it appeared that whoever painted the car did not mask it properly. Appellant's CRX had damage that was consistent with receiving force from the left side of the car. (19 RT 3602-3621, 3675-3676.)

Detective Walton found that Richard's car had damage in the rear of the vehicle that appeared to be consistent with a collision with a stucco type wall or a cement product, or a cinder block wall.[20/] The car's right rear bumper also

---

20. Detective Teague had found debris from Richard's car at the intersection of Esmeralda and Huntington Drive, approximately a half-mile

had marks on it that were caused by a spinning object, a wheel or tire from another vehicle. Richard's car could have been moving or it could have been stopped when the other vehicle made this damage. Detective Walton could not state an opinion whether the two cars came together because of the repairs[21] that had been done to appellant's CRX. However, it was possible that they came together. (19 RT 3643-3644.)

Detective Walton also examined some vehicle pieces that were consistent with having been from Richard's car. The pieces had rotational marks consistent with having been caused by a rotating tire. After viewing photographs of where the pieces were found along the roadway at the crime scene, Detective Walton opined that Richard's car could have been side-swiped by a faster moving car. He also opined that he would have been able to conclude whether the two cars had come together if appellant's CRX had not been repaired. (19 RT 3646-3651, 3673-3674.)

8. Other Police Investigation

In November 1994, Detective Teague received a business card from Irma Casas, Mike Arevalo's aunt. (16 RT 2959.) The card had the name of Verdugo's Location Cleaning. (16 RT 2959-2960.) On November 2, 1994, Irma also telephoned Detective Teague with a phone number for the business. Detective Teague telephoned the business, but nobody answered the telephone. After calling information for the 909 area code, Detective Teague learned that the phone number was for a residence in Rialto. Detective Teague re-dialed the number and Paul answered the telephone. (16 RT 2960.) The phone call was

---

from the crime scene. (15 RT 2748-2750.)

21. Ronald Roquel, a criminalist for the Los Angeles Police Department, opined that six months would be sufficient time to dismantle a fender and remove blood from a car. (19 RT 3585-3586; 20 RT 3757-3758.)

made at approximate 9:30 a.m. (16 RT 2964.) Detective Teague informed Paul that he needed to speak with appellant concerning a matter that happened at the Halloween party. He also asked Paul when he last saw appellant and if he knew where appellant currently was. Detective Teague did not say that he wanted to speak to appellant about a murder. He gave Paul his name and phone number at the Hollenbeck Station. (16 RT 2964.)

At approximately 2:50 p.m. on November 2, Detective Teague received a telephone call at the Hollenbeck Station from a person who identified himself as appellant.[22] (16 RT 2967.) During the November 2 interview, appellant said that he lived in Las Vegas and worked for the TG&E Construction Company. (16 RT 2970.) He refused to give Detective Teague his address and telephone number in Las Vegas. Detective Teague told appellant that he needed to speak with him and interview him about the injury to his friend Mike Arevalo that occurred at the Halloween party. He also said that he would come to Las Vegas for the interview so appellant would not be inconvenienced. Appellant said that he would be paid shortly and that he would come back to Los Angeles. (16 RT 2971.) Appellant sounded nervous. (16 RT 2971-2972.) The conversation lasted only three or four minutes. (16 RT 2972.)

Detective Teague next telephoned the Las Vegas Police Department and requested a utilities check on appellant and requested whether there was a listing for the TG&E Construction Company. Detective Teague was advised that there was no listing for the construction company. (16 RT 2972.) However, there was a TG&A Construction Company located on Sahara Boulevard. (16 RT 2972-2973.) The information regarding the TG&A Construction Company was no of assistance in the investigation. (16 RT 2975.)

---

22. Detective Teague spoke with appellant after he was subsequently arrested. He said that appellant's voice was the voice he heard during the telephone conversation on November 2. (16 RT 2969-2970.)

On November 7, Detective Teague learned that appellant's brother Michael Verdugo lived on Hellman Avenue, approximately .45 miles from the crime scene. (16 RT 2975.) He also learned that appellant's sister Mary Alice Baldwin lived on Foster Avenue in Oceanside. (16 RT 2975-2976.) On November 16, Detective Teague went to Baldwin's residence and asked her when she last saw appellant. Detective Teague did not see appellant at Baldwin's home, and he did not see any evidence that appellant had been there. (16 RT 2976.)

On December 7, 1994, Detective Markel served a search warrant at the home of appellant's brother Michael Verdugo and his wife Donna Tucker on Hellman Street. Inside their house, he found a shotgun belonging to appellant.[23] The shotgun was inside a case and was found under a bed in one of the bedrooms of the house. He subsequently booked the shotgun into evidence. (17 RT 3187-3190.)

On December 7, 1994, a search warrant was served on the Verdugo residence in Rialto. (16 RT 2976.) On December 8, Detective Teague again phoned the Verdugo residence in Rialto and spoke with Sal. Detective Teague told Sal that he needed to speak with appellant. He also asked Sal when he last saw appellant, and whether he knew what had happened to appellant's Honda CRX. (16 RT 2977.)

Next, Detective Teague presented the case to the Los Angeles County District Attorney's Office for filing consideration to charge appellant with two counts of murder. A warrant for appellant's arrest was subsequently issued on December 9, 1994. On December 13, at approximately 7:10 a.m., Detective Teague again spoke with Sal. He advised Sal that a warrant was in the system

---

23. Mike Arevalo identified the shotgun as looking similar to one owned by appellant. Ray Muro identified the shotgun as looking like the one he saw in appellant's CRX at the Halloween party on the night of the murders. (9 RT 1673-1674; 10 RT 1899; 11 RT 1946, 1948, 1976.)

charging appellant with two counts of murder. He also said that it was necessary for appellant to surrender himself. (16 RT 2978; 23 RT 4370.) Detective Teague was contacted by an attorney on behalf of the Verdugo family who asked whether the murder warrant had been issued. Detective Teague advised the attorney that the warrant had been issued. Detective Teague asked the attorney if he could try and locate appellant. The attorney said that he would attempt to do so. (16 RT 2979.)

Detective Teague organized a press conference for December 14, 1995, at 11:00 a.m., at the Hollenbeck Station regarding the case. The reason for the press conference was that the police had not received help from any members of the Verdugo family in attempting to locate appellant. Detective Teague and the police felt that if the public at large knew of the crime and knew what appellant looked like, and the vehicle he was driving, it would help in capturing appellant. A photograph was provided to the media. (16 RT 2979; 23 RT 43684373.) The photo given was the one that Detective Teague discovered during a search of appellant's bedroom on December 7. (16 RT 2935, 2945, 2980.)

On December 15, 1994, Detectives Teague and Markel spoke with Sal's brother Abelardo Verdugo, and Abelardo's son Juan Carlos Enciso. (16 RT 2982; 21 RT 3937.) While Detective Markel was speaking with Abelardo, Sal arrived. Detective Markel told Sal that there was a warrant for appellant's arrest. He also tried to convince Sal to have appellant turn himself in. Sal said that he had not heard from or seen appellant, but he would inform Detective Markel when he did. Sal never called. Abelardo and his wife Elva were transported back to the Hollenbeck Station for an interview. (21 RT 3937-3938.)

Detective Teague interviewed Enciso, on December 19, 1994. The interview with Enciso occurred at his place of work at Town Center in

Norwalk. (16 RT 2982-2983; 23 RT 4375-4376.) Appellant had come to Enciso's home one or two times in October of 1994. He did not talk with Enciso about the case. Appellant did not tell Enciso that he was on the run or a suspect regarding the murders. Appellant mentioned that he had been shot at while driving on a freeway, and that gang members were involved. Appellant said that during the incident, he had to shoot at the gang members.[24] Enciso said that appellant told him the CRX needed to be repaired because it crashed during the incident. (17 RT 3229-3232, 3236-3237, 3239-3249; 23 RT 4376.)

Enciso also told the police that he and appellant had set fire to a car belonging to someone appellant believed wronged him. (18 RT 3426-3427.) A person named Tommy had "set [appellant] up to be stabbed." (18 RT 3440-3441.) Tommy had left appellant in an area where others approached him and stabbed him. Tommy had run away. (18 RT 3442.) Appellant was out with Enciso and another person named Steve. Appellant bought gasoline. They went to Tommy's house and appellant poured gasoline over Tommy's car. Appellant lighted the gasoline.[25] (18 RT 3442-3450.) The burning of the car was revenge for the stabbing incident. (18 RT 3440-3441, 3461; 21 RT 3947.)

After the police interview, Enciso felt like a snitch and was concerned about the safety of his family. (18 RT 3373-3374.) He was worried about

---

24. An audiotape of the interview by Detective Markel was played for the jury. (18 RT 3371-3372.) Before Detective Markel began taping the interview, however, Enciso told him that while appellant was at Enciso's home cleaning a carpet, appellant said he had killed two people. Appellant said that he was being chased on the freeway, and it was either him or them. Appellant said that the incident occurred near the first week of November of 1994. (21 RT 3941-3946.)

25. During the interview, Detective Markel informed Enciso that he could be prosecuted for his conduct regarding the burning of the car. On cross-examination, Enciso was given use immunity as to his testimony. (18 RT 3414-3427.)

testifying against appellant, and he did not want to testify. (18 RT 3375.) Enciso did not believe appellant's story that the shooting occurred on the freeway. (18 RT 3378.) Appellant said that he "blew two people away." (18 RT 3381-3382.) Appellant said that they were shooting at him and that is why he shot them. (18 RT 3382-3383.) Enciso told Detective Markel that he had seen the news stories about the murders. (18 RT 3386-3390.) Enciso knew that appellant was "on the run." (18 RT 3397.) Enciso saw appellant one additional time after the occasion where he said that he "blew two people away." (18 RT 3400.)

Detective Teague contacted Channel 11 News and spoke with Tony Valdez. (16 RT 2983-2984.) He wanted to get information about the case in the news segment known as LA's Most Wanted. Valdez came to the police station, and Detective Teague gave him information about the case. A segment was filmed with Detective Teague about the case. Detective Teague provided the name of the victims, where the crime occurred, the date of the crime, the name of the suspect, and three photographs of appellant. He did not give any details about how the crime occurred or any of the evidence obtained. He told Valdez that a shotgun was the murder weapon, but he did not state how many shots were fired. (16 RT 2984.) Valdez returned to the station on December 22. (16 RT 2984.) The segment ran on television the following Saturday. (16 RT 2984-2985.)

Next, on December 28, Detective Teague went to a residence on Lindale Avenue in Norwalk, owned by someone identified as Aunt Annie. He did not see appellant at that residence. (16 RT 2981, 2983, 2985-2986.) He found a pickup truck belonging to appellant that was parked there. In the bed of the truck were items that had been in appellant's bedroom in the Verdugo residence in Rialto such as clothing, briefcases, boxes of material. (16 RT 2985-2986.) Detective Teague also found two faxes to appellant from a person named

Doreen Duran. (16 RT 2986, 2995-2996.) One of the faxes had a telephone number on it. Detective Teague called the number and spoke with Duran at her place of business. (16 RT 2989.) He told Duran that he needed to interview her. He then went to Duran's place of business, picked her up, and took her to the Hollenbeck Station. (16 RT 2989-2990.)

Detective Teague advised Duran that appellant was wanted for two counts of murder. He asked if she knew where appellant was. He then learned that appellant had been living with Duran on Beverly Boulevard in Pico Rivera. (16 RT 2990.) After speaking with Duran, Detective Teague went to the residence on Beverly Boulevard in Pico Rivera. (16 RT 2990-2991.) He entered the residence along with Duran. Appellant was not there. They waited a few hours at the residence for appellant to return. (16 RT 2991.) Duran made a telephone call to a number that she knew. (16 RT 2996.) It appeared that she had made contact with another person through the call. (16 RT 2996-2997.) The conversation she had with the other individual lasted a minute or two. (16 RT 2997.)

After the call, Detective Teague and Duran, along with several other offices, went to a bar called Sharkeys in Rosemead. (16 RT 2997.) They watched for appellant to enter the bar. (16 RT 2997-2998.) They waited for ten to fifteen minutes, but they did not see appellant. (16 RT 2998.)

Duran then directed them to the residence of J. P. Hernandez, a friend of appellant. Hernandez's residence is on Donnely in San Gabriel. They arrived at Hernandez's home at 8:30 p.m and the officers deployed around the residence. (16 RT 2998; 17 RT 3201-3202.) Detective Teague entered the home. He discovered that the back door was standing wide open, the television was on, and there was a partially eaten plate of food on the coffee table in front of the television. There was nobody inside the residence. They returned to Sharkeys. (16 RT 2999.)

One of the officers entered Sharkeys, but did not see appellant. They remained at Sharkeys only briefly. They drove back again to Hernandez's residence. (16 RT 2999-3000.) En route, Detective Teague recognized a person who was walking down the street. He stopped, exited his car, and identified himself to the man. The man identified himself as J. P. Hernandez. Detective Teague detained Hernandez and told him that he was looking for appellant. Hernandez said that appellant had been at Hernandez's home about an hour earlier. Appellant had not mentioned anything about the police trying to find him. After appellant left his home, Hernandez said that he did not see appellant again. (16 RT 3000; 17 RT 3203-3211, 3210-3222.)

Detective Teague drove Hernandez back to his home and further interviewed him. Then, a search was conducted in the area to look for appellant. (16 RT 3000-3001.) After searching for fifteen to twenty minutes, appellant was not found. After driving around the area, they returned to the Hollenbeck Station. Duran was released and she went home. (16 RT 3001.)

On December 29, at approximately 6:30 a.m., Detective Teague phoned the Verdugo residence again and spoke with Sal. (16 RT 3001-3002.) Detective Teague told Sal that they had been searching for appellant and that appellant was in the area. Detective Teague also told Sal that he needed to get appellant to surrender. At approximately 7:00 a.m., Detective Teague received a message from appellant on the answering machine for the Hollenbeck Homicide Unit. The voice on the message was the same as the one he heard when he interviewed appellant by telephone on November 2. (16 RT 3002.) Appellant stated that he wanted to turn himself in and tell his side of the story. He did not leave a return phone number and did not say when or how he would turn himself in. Detective Teague next telephoned Mark Marquez, Duran's roommate, and asked whether he had heard from appellant last night. (16 RT 3003.) He also told Marquez to call him if he saw appellant. (16 RT 3003-

3004.)

Detective Teague received a phone call from Duran at approximately 8:50 a.m. He informed her that appellant was wanted for murder and that he needed to turn himself in. At noon, Detective Teague began checking the motels in the area of Sharkeys to see if appellant had checked into one of them the previous night. Detective Teague later re-interviewed Hernandez at his place of business. (16 RT 3004.)

On December 30, Detective Teague notified the United States Customs Service that Sal's vehicle was possibly crossing the United States/Mexican border. He also notified the customs service that Sal was crossing the border between the United States and Mexico. (16 RT 3004-3005; 23 RT 4377-4378.)

Newspeople from Univision, a Mexican television network, came to the Hollenbeck Station. Detective Lovato, Detective Teague's supervisor, provided them information concerning the case. They were given appellant's picture, a picture of the victims, and general information about the crime. They also were told that appellant had a warrant for his arrest. (16 RT 3005.)

On January 5, 1995, Detective Teague received information that Sal and Paul were meeting with appellant, giving him money and possibly guns, and that appellant was en route to Mexico. On January 6, surveillance was initiated for Sal, but no information was obtained. Detective Teague contacted Sal's brother Abelardo and informed him that appellant had a warrant for his arrest and that the family needed him to surrender. (16 RT 3006.) Detective Teague then went to the home of Mike Arevalo on Hellman, but appellant was not there. (16 RT 3006-3007.)

On January 6, Detective Teague met with members of the police department's Foreign Prosecution Unit. He received information that appellant was possibly in Mexico. Detective Teague briefed members of the unit as to the crimes that occurred. The members of the unit made copies of the murder

book so it could be translated to Spanish for extradition purposes should appellant be found in Mexico. A search was warrant was obtained for Sal's telephone records to ascertain whether he was telephoning appellant in Mexico. (16 RT 3007.)

A staff writer from the Los Angeles Times interviewed Detective Teague about the crimes and the attempt to locate appellant. A story about the case was run in the Times Metro Section on February 3. (16 RT 3007-3008.) Detective Teague met with an FBI agent concerning attempts to track Sal in an attempt to find appellant. Detective Teague told the agent everything that he had learned about the case and that appellant was possibly in Mexico. There also was a possibility that appellant had gone to other family members in different states. (16 RT 3008.)

The next information received was that appellant may have been in Peoria, Illinois, staying with a relative. (16 RT 3008-3009.) Detective Teague had the Peoria Police Department check the location where appellant was believed to be. Appellant was not there. (16 RT 3009.)

On April 26, at approximately 7:30 p.m., Detective Teague obtained a search warrant to once again search the Verdugo residence in Rialto for appellant. The warrant was served on April 27 by the SWAT Unit of the Rialto Police Department.[26] (16 RT 3009.)

9. The Testimony Of Donna Tucker

Donna Tucker was married to appellant's brother Michael Verdugo. She has known appellant since he was three years old. When appellant left home, she was living on Hellman Avenue in El Sereno, next door to Sal. She was

---

26. Appellant was arrested on April 27, 1995. (17 RT 3172.) The details regarding appellant's arrest will be described in more detail in Section I.A.10 of the Respondent's Brief.

close with appellant while he grew up. Michael worked in construction and was a wrestling coach. Appellant would go to work with Michael at times, and Michael taught him to do dry wall. Appellant's other brother Paul also did drywalling. Donna also was close with appellant's sisters Pauline and Mary Alice. Pauline lived in Sal's residence on Hellman until September of 1994. Donna remained in touch with Pauline, but none of the other members of the Verdugo family knew how to contact Pauline. (21 RT 3960-3964, 3971-3972.)

The Verdugo family moved out of the house on Hellman in February of 1994, and moved into the house in Rialto in June or July of 1994. Donna Tucker and Michael Verdugo continued to live on Hellman. The Verdugos had relatives in Norwalk - Annie Martinez and Abelardo. Appellant's sister Mary Alice and her husband Chuck Baldwin lived in Oceanside. Donna also was acquainted with Mike Arevalo. Appellant said that he and Arevalo were like brothers and would do anything for each other. Appellant had made that statement to Donna in the summer or fall of 1993. (21 RT 3966-3967.)

Donna Tucker's home was approximately a quarter of a mile from the fire station at Huntington Drive and Monterey Road where the murders occurred. (21 RT 4006.) On the morning of October 23, appellant telephoned Donna and asked her, "Did you hear the shots in the neighborhood? My friend Mikey told me that there were shots fired in your neighborhood." (21 RT 4005.) Appellant said that the shots had been fired the previous night. He was excited as he spoke. She told him that she did not hear any shots because she went to bed early. Donna thought the call was unusual. (21 RT 4005-4006.)

Sometime between October 23, 1994, and November 2, 1994, Donna Tucker had asked appellant if he would help Michael Verdugo and her move belongings of theirs from a storage facility back to their home. Appellant said that he could not because he had been out all night. He also said that he could not come into their area because it was too dangerous for him. (22 RT 4109-

4110.)

Donna Tucker saw appellant on November 2. He was at a construction site in Van Nuys on Hazeltine Avenue. He had come to the site to clean carpets in a residential unit that was being sold that day. Donna and Michael Verdugo worked at the construction site. That day, appellant was driving what had been Donna's 1979 Datsun pickup truck. She had sold the truck to appellant, but he had not yet paid for it. While he cleaned, he got a page from his brother Paul. Paul had put in a code of "911" which meant to call him immediately due to an emergency. Donna took appellant to another unit that had a working telephone. Donna went into the unit with appellant. She stood in the kitchen while was in the dining area speaking on the telephone. After the call, he told Donna that the police wanted to speak with him about a fight at a party. Donna told appellant to use the telephone to make another call. (21 RT 4007-4009.)

Donna Tucker saw appellant make the call and heard him say that he left the party early and did not see a fight. He said that he was calling from Las Vegas, and that he was in Las Vegas working on a construction site. He said that he could not give his phone number or address. After the call ended, appellant told Donna that he had been speaking with the police. He said that the police wanted him because of some information about being a witness at a fight at a party. He also said that he was on the way to Magic Mountain and he shot and killed two guys. Then, he said that he was at a party. He left the party and somebody was chasing him. They cut him off and crashed into him at Huntington Drive and Monterey Road, then the guy in the other car said he was in a gang, and started shooting at him. He said the guy had tattoos from head to toe. He said that there was a girl with him and that he shot her because she saw everything. (21 RT 4010-4011.) He said that he shot the guy because "it was him or me" "so I shot him." (21 RT 4012.) He seemed serious as he spoke. He also said that he was going to run away and had to leave because the

police would be after him. Donna tried to convince him that nobody apparently was coming. However, appellant insisted that he had to leave. Donna told him to speak with his father. (21 RT 4013.)

After the cleaning job was done, appellant called his father. Donna Tucker did not hear what he told his father. After making the phone calls, they went to a Taco Bell. Appellant said that the police would probably go to the home of appellant's sister Mary Alice [hereinafter "Mary Alice"]. Mary Alice's home because her address was listed on his driver's license. Donna told appellant to call Mary Alice and explain what was happening. He agreed. Appellant telephoned Mary Alice from the restaurant, and Donna also spoke with her. Appellant said that he would run away to Arizona. The next day, Donna spoke with Sal and Mary Alice by telephone. Donna told Sal that appellant said he was wanted by the police and that he had told her several stories. She asked if appellant had gone home and Sal said that he had. She told Sal appellant's story about the gangster who was tattooed and the two guys he shot on the way to Magic Mountain. (21 RT 4011, 4013-4016.)

Donna Tucker had arranged to meet with appellant on November 10 at a Bank of America parking lot in South Pasadena. Before going to the meeting, Donna saw an article in the El Sereno Star newspaper. The article described a couple of murders and some of the things about the murders sounded familiar to one of the stories appellant had told her. She cut out the article and brought it with her to the meeting. (21 RT 4016-4018.)

When Donna Tucker saw appellant at the bank's parking lot, he was alone and drove the Datsun pickup truck. He said that he had left some equipment on the job site on November 2. Appellant wanted to pick it up, but he could not come to Donna's neighborhood. Appellant said that the police and the FBI were after him. He kept looking around, but saw nobody. (21 RT 4016-4017.)

Donna Tucker showed appellant the newspaper article. She asked him "is this the one you were talking about? Did you do this?" He replied, "Yeah, that's the one." He read the article. He said that that was not the way it happened. He said that he was being chased by gang members who cut him off and crashed into him. When he got out of the car, they started shooting at him. (21 RT 4019.) The guy was "tattooed from head to toe," "it was a shoot-out," and "it was him or me . . . so I shot him." He said that he killed the girl because she saw everything. He said that he "got a rush off of that, that it felt really good." He smiled as he said that he got a "rush off of" killing the girl. Appellant seemed excited. (21 RT 4020.) Appellant also told her that his brother Paul had helped appellant get rid of the clothes he wore during the shooting and dispose of the shotgun. (22 RT 4110-4111.)

Donna Tucker said that she had talked to his father. Appellant replied that he was going to run away. Donna told him that he could not do that to his father. He had to go home and talk to his father and tell him whatever was going on. Appellant said that he would go home. (21 RT 4021.) They remained at the parking lot for fifteen to twenty minutes. (21 RT 4020.) When appellant left, Donna went to a pay phone at a liquor store and telephoned Sal. She told Sal everything that appellant had said. Sal said that he would handle it. (21 RT 4022.)

When Donna Tucker returned home, she made eight photocopies of the newspaper article. She wrote things on the copies and intended to put them in her safe deposit box. Later, Donna and Michael Verdugo tore up the articles and copies, but there was one copy that she did not destroy. The remaining copy was in the glove compartment of Michael's car. At a later time, she received a telephone call from Annie Martinez. After speaking with Annie for a short period of time, Donna telephoned Paul. They spoke for a couple of minutes. (21 RT 4023-4025.)

Sometime after the December 1994 search of their home by the police search, Donna Tucker and Michael Verdugo went to the Verdugo residence in Rialto to convince appellant to turn himself in. When they arrived at the Verdugo residence, they talked with Sal in the backyard of the house for approximately five minutes. (21 RT 4026-4027; 22 RT 4111.) Michael asked Sal what would he do if the police came. Sal said that they had taken weapons away from appellant and hid them because appellant was talking about suicide. Sal told Michael that he had to worry about appellant. Sal also said that he was getting paperwork together including a false identification and Social Security card. Donna told Sal that he was "always telling" her to take care of Michael, but how could she do that with what Sal was doing regarding appellant. She also said that there are two dead kids. Sal gave her an extremely angry look. (22 RT 4111-4112.)

Donna Tucker and Michael Verdugo went inside the house. Michael went upstairs to talk to appellant. Sal took Donna with him to get some food. (21 RT 4028; 22 RT 4112.) Sal had told her, "you're going with me now" or "get in the car." (21 RT 4028-4029; 22 RT 4112.) They went to a Del Taco and got food. (21 RT 4029.) While in the car, Sal told Donna, "If you talk to the police - if anyone talks to the police, I can go to the courts, I can find out who said any - whatever - anything that they said. And that they just better watch out. We will keep quiet." Sal appeared to be very serious when he said this. Donna said, "There is [sic] two dead kids." Sal said, "You're going to keep quiet." He was very forceful when he said it. He also said, "If looks could kill." (21 RT 4033.) When they returned to the Verdugo residence, Donna was taken to see appellant. Paul stood behind Donna. Michael stood behind appellant and next to the closet. Donna began to cry. She told appellant, "You're almost as tall as me." (21 RT 4034.) Appellant gave Donna a big hug and said that he would never have hurt her or Michael. He sat down

on the bed. Donna knelt in front of him. She asked him to turn himself in. He said that he would not do that, and that he would never do that. (21 RT 4035.)

Donna Tucker told appellant that she and Michael Verdugo brought two handguns to get appellant to turn himself in. They left the handguns in the car because Sal was willing to shoot it out with the police and they did not want to get shot. She told appellant that if he wanted to come with them, that was different. Appellant said that he would never turn himself in. He said that he wanted to die. He also said that Sal was going to get paperwork together to change his identification. He would leave or kill himself, but he would never turn himself in. She showed him an article from the Los Angeles Times describing the murders. She had kept the article to remind herself that even though she loved appellant, and the Verdugos were her family, what mattered most were these two victims and that appellant had to be caught. (21 RT 4035-4036; 22 RT 4113.)

Appellant did not read the article Donna Tucker showed him, but he said that he had already seen the article. (21 RT 4040.) She asked him if he did the crimes described. He said, "Yes." She asked if he was sorry about what he did, and he said, "No." He said that the firemen saw him from the upper floors of the fire station, his fingerprints were on the shotgun shells, and they had his eyeglasses. He also explained that the article included false information about traffic. Appellant believed that the police put false information in such articles describing crimes because only someone who actually committed the crime would know that the detail was false. (21 RT 4036.)

Appellant told Donna Tucker that he had been in Mexico, but he left when a local newspaper showed a picture of him in a beard, which was how he looked at that time. The people he stayed with brought him to a hotel in San Diego. He telephoned Sal or Paul from there. They came and picked him up. As appellant spoke, Donna heard Michael Verdugo talking to Paul in the

hallway and heard the word "closet" mentioned. Appellant told Donna that the last person he wanted to see was Pauline, and he asked Donna for her address or phone number. Donna refused to give appellant this information. Appellant then went to Sal's room and wrote a letter to Pauline. She helped him with the spelling because he did not spell very well. He was shaking violently. He wrote that he was sorry for what he had done, that he loved her, that things did not look good for him and that he wanted to see her and that he would wait to see her. Donna agreed to mail the letter to Pauline and that he would stay there until he heard from her. Donna and appellant went downstairs. They ate together. Donna sent the letter to Pauline the next day and waited for her response. The next time she saw appellant was Mother's Day of 1995 when he was incarcerated. (21 RT 4036-4040.)

After going to the Rialto residence, Donna Tucker had several conversations with Annie Martinez. She also sent a fax to the police. The information she included in the fax was that appellant had been seen in the Rialto area. She wanted to hide how the police found out the information because she had been threatened and did not know who else saw appellant at the Rialto house. Donna was afraid. (21 RT 4041-4043.)

In January of 1995, Donna Tucker spoke with Sal by telephone on one occasion. She told Sal to tell appellant to turn himself in. Sal replied that "you're either with us or against us, if you're against us, watch out." Paul said the same thing when Donna spoke with him. (22 RT 4109.) Donna and Michael Verdugo repeatedly tried to contact Sal to get appellant to turn himself in. (22 RT 4108-4109.)

Sal was attempting to get a new driver's license, Social Security number, and Social Security card with false information for appellant. Sal also coached appellant as to what to say if he were stopped by the police and arrested and interviewed. After appellant had been arrested, he telephoned Donna Tucker

and told her to tell Sal that he remembered everything that Sal said. Donna paged Sal and later told him what appellant had said. He confirmed that appellant was referring to his having coached appellant about what to say. (21 RT 4040-4041.)

Sometime later, a letter arrived in the South Pasadena post office box that Donna Tucker used. The letter was addressed to Pauline, and the writing appeared to belong to appellant. The letter was postmarked from San Bernardino. Donna held it up to the light and saw that it said something about a shotgun. She opened the letter and confirmed that the letter was from appellant. The Verdugo family knew that if they needed to contact Pauline, they had to send the message first to that post office box. Donna would then forward the message to Pauline. (21 RT 4043-4044; 22 RT 4115-4116.) From what Donna could recall, the message stated that "they've got the shotgun shells - my fingerprints are on the shotgun shells and my eyeglasses were found at the scene." (22 RT 4116.) Also in the envelope was a copy of a Los Angeles Times article about the crime, portions of which had been underlined. Donna told Michael Verdugo about the letter, but he did not want to read it. The next morning Donna went to the South Pasadena library and called Detective Markel. She read the letter to the detective. He said that the police would want the letter for evidence. Donna agreed to give it to them. (22 RT 4117-4119.)

When Donna Tucker returned home, Michael asked where she had been. Michael also said that someone had called about a fax that had been sent. She put the letter in the pantry. Michael wanted to read the letter. She got the letter and he read it. After Michael read the letter, he said that he wanted to hide it. (22 RT 4119-4121.)

On a subsequent occasion at their home, Donna Tucker and Michael Verdugo were speaking with Sal when Sal mentioned that he was very proud of appellant for having written a letter to Pauline. Donna falsely informed Sal

that she had not seen the letter. She also did not want Pauline to get the letter. Michael later was speaking with Sal and he retrieved the letter to show to Sal. (22 RT 4121-4124.) Donna heard Sal say, "You're right, it can't be sent to her." (21 RT 4124.) Sal returned the letter to Michael. (22 RT 4125.)

On May 1, 1995, Michael Verdugo gave Donna Tucker the letter. The next morning, May 2, 1995, Donna made the arrangements to meet the police at the South Pasadena Library. She had made a photocopy of the letter. She reserved a conference room and intended to give the photocopy to the police and keep the original so that it was still in the house. Detectives Teague and Markel met her. Detective Markel said that they needed the original. Donna gave him and Detective Teague everything. She did not believe that appellant was under arrest yet at that time. (22 RT 4119, 4126-4128.)

At some later time before appellant was arrested, Sal had told Donna Tucker that the police had been to the Rialto house and missed appellant. Sal said that the police and the FBI were stupid. (22 RT 4114, 4129-4130.) Donna had told Michael Verdugo and Sal about the statements appellant made to her about the crimes. She also had told them about the statements appellant made to her in the bedroom in the Rialto house. (22 RT 4130-4131.)

After appellant was arrested, Sal held a family meeting at the Verdugo residence in Rialto. Paul Verdugo was in jail. Those attending the meeting were Sal, his ex-wife Ivelissa, Michael Verdugo, Mary Alice, and Donna Tucker. Sal was concerned about who said anything to the police. Sal blamed Mary Alice for turning in appellant. (22 RT 4131.) Michael said, "I'm sorry. I can't say that." (22 RT 4131.) Although it was mentioned to Sal that maybe the police just saw something or had some other evidence, he still was insistent that some family member had "snitched" on appellant. Paul had called from jail and spoke with Donna. He told Donna that he and Sal went "all the way" for appellant. Donna Tucker gave Sal the message and said "we all did." (22 RT

4132.)

Donna informed the police about the information she learned from appellant in the parking lot at the Bank of America. The reason Donna waited until after appellant's arrest to convey the information was because Sal had said that the incident had been handled because appellant only was wanted as a witness to the fight that occurred at the party. (22 RT 4133-4134.) After the search warrant was executed at her home, the police told her details that "fit" with the story that appellant had told her. After the police left, Donna heard from Paul, who bragged that the police "just missed" the gun and the clothes that were in the car. He said that he "took care of that." When Michael Verdugo returned home, she told him what Paul had just said. She also told Michael about the copies of the El Sereno newspaper article. Michael said that she was stupid for keeping them and that the copies should have gone into their safe deposit box. (22 RT 4135.)

At some point, Donna Tucker accompanied Michael Verdugo to a deposition. She brought the newspaper articles with her at Michael's request. En route to the deposition, Michael said that the copies had to be destroyed. They tore up the copies of the articles, but Donna hid one copy in Michael's car. Donna felt that based on prior threats made by appellant that he was very dangerous. Along with the threats from Sal, she was willing to wait until trial to tell only the prosecutor what was happening and what appellant said. Donna had told Michael that she was already involved in the case because of what appellant told her and that she could not stay out of it. (22 RT 4135-4137.)

Donna Tucker had begged Michael Verdugo to move to a safe area where she could contact the police. She told Michael that he had to choose between his family and her. He said that he needed to worry about his father. Donna stopped telling Michael that she was communicating with the police because she did not trust him anymore. (22 RT 4137.) On one occasion,

Michael asked her what she would do if the police or the district attorney wanted to talk to her. She said, "Mike, there are two dead kids. You have known me for 20 years. I'm an officer of the court." She realized that she could not "get through" to him so she walked away. (22 RT 4138.) She had made it clear to him that she would cooperate with law enforcement. (22 RT 4139.)

On cross-examination, Donna Tucker stated that appellant was against Michael Verdugo marrying her. Appellant had threatened to kill both of them. For a year after wedding, appellant told her how he could do it. (22 RT 4145, 4237-4238.) He said that Michael could get killed because he had driven Michael's truck sometimes and that guys who sought appellant may shoot Michael. Appellant knew someone who knew how to make pipe bombs that could be put in a mailbox or at her front door. Appellant said that it would "take out everybody in the house." (22 RT 4238.) Appellant also said that they could be going for a walk and they could get shot in the back of the head. He said that he knew how to make a killing look like a gang killing. (22 RT 4238.) Donna left the house she had shared with Mike on July 7, 1995. (22 RT 4147, 4216.)

10. Appellant's Arrest

On April 27, 1995, at approximately 12:30 p.m., Officer Matthew Huddleston of the Rialto Police Department received a call regarding this case. Officer Huddleston was assigned to the SWAT team. He was later informed that the SWAT Team was assigned to assist the Los Angeles Police Department at the Verdugo residence in Rialto. The Los Angeles Police Department believed that appellant was at the residence at that time. They established a command post approximately 500 yards from the residence. They also established an outer perimeter to block traffic from entering the area, and an

inner perimeter surrounding the residence itself. (17 RT 3155-3156, 3159-3160.)

Officer Huddleston and other officers went to the residence and entered the back yard. As they hid behind a pickup truck, they could hear somebody yelling inside the house through a rear sliding glass door that was open in the house. The voice was male. Next, they heard what sounded like more than one person running up a flight of stairs. Shortly thereafter, at 3:30 p.m., appellant's brother came downstairs. The officers called to him through the open sliding glass door. After appellant's brother came out of the house, he was taken into custody and taken back to the command post. (17 RT 3160-3161.)

At 3:45 p.m., Officer Huddleston was informed that he would be the primary officer of the entry team into the house. He entered the house on his stomach, and used mirrors to clear corners. One member of the entry team straddled his back holding a handgun. A third officer was armed with an MP-5 machine gun. There were three other officers on the team. The last to enter the house had a sub-machine gun. (17 RT 3161-3164.)

As the entry team made their way through the house, they searched a closet in one of the bedrooms. The eventually discovered that the closet had a gap behind one of the shelves in the closet. Appellant was found hiding in the space in the closet. After the entry team removed some of the shelving, appellant was able to slide down to a sitting position, and he was removed from the closet. The officers took him into custody at approximately 5:15 p.m. A member of the team recovered a handgun inside the house. (17 RT 3164-3169, 3170-3172.)

B. Defense Case At The Guilt Phase

1. Appellant's Testimony [27]

a. Appellant's Testimony Regarding His Role In The Crimes

Appellant denied murdering the victims.[28] (23 RT 4491; 27 RT 5067-5075.) He testified that Ray Muro committed the murders. He knew this information since October 23, 1994. (24 RT 4585.) Appellant waited so long to disclose the information because "safety is involved also." (24 RT 4586.)

Appellant went to the Halloween party on October 22, 1994. (24 RT 4537.) He arrived sometime before midnight. Appellant drove the CRX to the Halloween party. When he was interviewed by the police after his arrest, he lied by saying that he took a truck to the party. (25 RT 4675, 4706.) Appellant denied lying to the police about having taken his car because its tire tracks are at the scene. (25 RT 4676.)

Prior to the party, appellant went on a date with Doreen Duran to Magic Mountain. At the party, he parked at the top of the hill. In the kitchen at the party, there was an incident between Paul Escoto and another person. Escoto had been drinking at the party and appeared to be intoxicated. (24 RT 4538-4540; 25 RT 4704.)

Mike Arevalo, Ray Muro, Paul Escoto, appellant, and some others were in the kitchen. (25 RT 4706-4707.) At one point, somebody turned off the

---

27. Appellant testified that during the days of his testimony, he had been taking medications provided at the jail. Appellant did not know whether the medication had been affecting him or not. When asked if he felt any effects from the medication, appellant replied, "It's confusing." Appellant said that it was confusing because these events happened two and one-half years earlier. (27 RT 5099-5100.)

28. At the time of his testimony, appellant did not have a juvenile or adult criminal record. (24 RT 4533.)

lights. Arevalo and Ray Muro grabbed "some guys" and slammed them against a wall. (25 RT 4707.) The lights came on. Mike Arevalo and "one of the guys" talked and things settled down. The guys left the kitchen. (25 RT 4708.) Escoto was still "pissed off" at Arevalo because Arevalo had jumped in. (25 RT 4709.)

At some point while appellant was in the kitchen, Mike Arevalo was hit by a bottle somewhere outside the house. Appellant did not see Arevalo get hit. There was a commotion and a big crowd on the back balcony of the house. Instead of going to check on his friend Mike Arevalo, appellant said, "Forget this, I'm out of here." Appellant then left the party. (24 RT 4539-4540; 25 RT 4711-4713.) Arevalo's friends and family said everything was fine so he left. (25 RT 4713.) Appellant also said that he did not need any more problems. (25 RT 4713-4714.) Appellant did not verify that Arevalo had been cared for, and he did not see Arevalo was covered in blood. Appellant believed that Arevalo was taken care of because he had a lot of friends there. (25 RT 4714.) Appellant believed that Ray Muro may have gone to Arevalo, but Paul Escoto had left the party. (25 RT 4715.)

Ray Muro was at the party when appellant left. Appellant knew Muro through Mike Arevalo. Muro was wearing a Marine outfit. (24 RT 4541.) Appellant denied going to the CRX and pulling out his shotgun. (24 RT 4542.) He went out the front of the house, up the street to his car. (24 RT 4543; 25 RT 4716.) When appellant got to his car, he found the driver's door was open, the lid of the gun compartment was open, and his shotgun, which had been in the compartment before he went to the party, was missing. The shotgun was black, had a pistol grip, and was fully loaded five rounds and one in the chamber. Also missing from the car was a blue Levis jacket which had been on top of the compartment that held the shotgun. Inside the jacket were appellant's eyeglasses, but not the eyeglasses that were found by Paul in the Verdugo

residence after appellant was arrested. (24 RT 4543-4545; 25 RT 4717-4722.)

When Appellant saw that his shotgun was missing, he looked under the CRX for his Hide-A-Key, but the Hide-A-Key also was gone.[29] Ray Muro, Paul Escoto, Mike Arevalo, and others knew that there was a Hide-A-Key under the CRX. (24 RT 4546-4547.) Appellant went back to the party and looked for Arevalo because he believed that Arevalo had taken his shotgun, as he had done in the past. (24 RT 4547-4548; 25 RT 4722.) When he returned to the party, appellant heard Arevalo yelling "Fuck you, bitch. You're going to get it." (24 RT 4548-4549.)

Appellant saw Mike Arevalo's aunt Irma Casas. He pulled Irma into a bathroom and told her that Arevalo had his gun and that he needed to find him. Appellant gave her his business card and told her to have Arevalo call him as soon as possible. Appellant and Arevalo were good friends. Irma later gave that card to a detective. (24 RT 4549; 25 RT 4666, 4723-4724.)

Appellant did not ask Irma how Mike Arevalo was or what he got hit with. He did ask where Arevalo was, but Irma did not know. (25 RT 4746.) Prior to leaving the party, Appellant did not seek out Arevalo or ask anyone what he had been hit with. (25 RT 4739-4740.) Appellant did not ask anybody outside the party what had happened to Arevalo. (25 RT 4749.) When appellant finally left the party, the only thing that he knew about Arevalo was that he had been hit. (25 RT 4749-4750.)

---

29. Appellant kept a Hide-A-Key under the driver's side fender of his car. He covered the Hide-A-Key with duct tape, taped it underneath the fender, and then spray painted the duct tape black. Ray Muro and Mike Arevalo knew about the Hide-A-Key taped under the fender. Appellant trusted Arevalo and his friends and family so he let them know about the key. He put the Hide-A-Key there when he first bought the CRX. He had taken the Hide-A-Key out a couple of times when he locked his key inside the car. He had seen Arevalo use the Hide-A-Key once. The Hide-A-Key was taken out and replaced twice in the month prior to the Halloween party. Every time the key would have to be retaped and repainted. (25 RT 4798-4805.)

Appellant left the party and went to the home of Mike Arevalo's father. He went there because he wanted to get his shotgun back from Arevalo and because he was concerned about Arevalo's condition. Appellant did not have to wait too long after arriving at the house before Arevalo arrived with his father, his father's girlfriend, and Ray Muro. He had listened to possibly two songs on the radio during the time that he waited. Appellant was seated in his CRX when they arrived. He also had the eyeglasses that he wore at the party. He went inside the house. (24 RT 4550-4552; 25 RT 4725-4727, 4808-4813.) He tried speaking with Mike Arevalo, but Arevalo said to wait until tomorrow. Appellant was still concerned about his shotgun, but now was more concerned about Arevalo's condition. (24 RT 4551; 25 RT 4814-4815, 4817-4818.) Ray Muro went inside his own residence next door. When Muro came out, he was acting jittery and had a drink in his hand. Muro offered appellant a drink, but appellant declined. Appellant prepared to leave, but Mike Arevalo told him to stay at Muro's home and they would talk in the morning. Mike Arevalo went to his father's home. Appellant stayed at Muro's home for that night. (24 RT 4551.)

Ray Muro could not sleep that night. (24 RT 4551-4552.) He drank a lot and kept changing channels on the television. He acted nervous. Appellant eventually fell asleep and woke up the next morning. (24 RT 4552.)

The next morning appellant wore Rayban sunglasses rather than the eyeglasses that he wore to the party.[30] Appellant spoke with Ray Muro and learned where his shotgun was. (24 RT 4555-4556.) Appellant, Mike Arevalo,

30. Appellant later testified that while he was fleeing from the police, he lost the eyeglasses that he had on at the party. He was not sure where he lost the eyeglasses. The eyeglasses found by Paul in the Verdugo residence after appellant was arrested were not the eyeglasses that he wore to the party. (24 RT 4567-4568.)

and Muro went to breakfast.[31] (24 RT 4552, 4853.) Appellant denied calling Donna Tucker on Sunday morning and asking whether she had heard gunshots. Instead, he was at breakfast with Arevalo and Muro. (24 RT 4558.)

While at breakfast, Mike Arevalo's mother came to the restaurant. (24 RT 4552.) She mother spoke with Arevalo outside the restaurant. (24 RT 4552-4553.) While Arevalo was outside, appellant told Ray Muro that he thought Arevalo had taken his shotgun. Muro replied, "No. Me and Paul [Escoto] did." Appellant said that he wanted the shotgun back. Muro said that he and Paul Escoto had taken care of things. Appellant asked what Muro meant by this statement. Muro said that his training paid off. Appellant said that he did not care what Muro did, he wanted his shotgun back. (24 RT 4583-4585; 26 RT 4843.) Appellant also asked Arevalo for the shotgun, but Arevalo denied having it. (26 RT 4851-4852.) Muro said that, "Mike doesn't have it. We have it." Muro said that he and Escoto had appellant's shotgun, but he did not say where the shotgun was. (26 RT 4854-4856.) When appellant asked again for his shotgun, Muro said "You're not getting it back." Appellant told Muro that Muro should have the shotgun at his house when appellant came to clean Muro's carpet. (24 RT 4586.)

Appellant ate his breakfast, but Ray Muro had trouble eating breakfast. (24 RT 4553.) He did not go to a mall with Muro and Mike Arevalo after breakfast because of what he learned at the breakfast. Appellant was scared because they told him not to call the police. (24 RT 4556.)

Appellant went to Ray Muro's house the next day, but Muro was not there. Mike Arevalo also was at Muro's house, but Arevalo and Muro did not return appellant's shotgun. (24 RT 4556-4557, 4587.) Appellant tried to get

---

31. At first, appellant testified that he went to breakfast in his CRX, but later he testified that he went in the Mike Arevalo's father's Cadillac. (24 RT 4601-4603.)

Arevalo to get the shotgun back. Arevalo said, "You better not say anything. It's your gun." (24 RT 4588.) Appellant did not go anymore to Muro's house to try and get back the shotgun. (24 RT 4589.)

Appellant did not talk to Paul Escoto about taking his shotgun. Appellant did not go to Escoto's house because he did not know where Escoto lived. (24 RT 4589.) Appellant did not call any law enforcement authorities to explain that his shotgun was taken. The last time appellant's shotgun was taken by gang members, appellant reported it to the police. Appellant said that his family was not at risk that time. (24 RT 4591.) Appellant said that he did not report the loss of his shotgun this time because "better to cut my losses right there." (24 RT 4592.)

After he was arrested, appellant did not tell Detectives Teague and Markel about the person who committed the shooting. He claims that he wanted to tell them, but he stopped. (25 RT 4653.) When he spoke with the detectives, he both lied about and "stayed away" from discussing the fight at the Halloween party and anything else dealing with Mike Arevalo and his friends. (25 RT 4654-4655.)

b. Appellant's Testimony Regarding The Burning Of Tommy's Car

On an evening in February of 1994, appellant received a call from his friend Tommy who needed a ride home from a nightclub. (23 RT 4494; 24 RT 4605-4606.) While driving Tommy in his CRX, Tommy asked to stop at a residence of a girlfriend of Tommy's twin brother. The girlfriend lived on a cul-de-sac in "the projects."[32] She lives in a cul-de-sac. When appellant drove

---

32. Appellant says that these "projects" were on the other side of the county jail, but he did not know what street they were on. Appellant was unable to identify where the projects were on a map without first being told where the county jail was. (24 RT 4603-4605.)

the CRX to the cul-de-sac and turned the car around, Tommy opened the door of the car and ran. Appellant turned off the car and exited. (23 RT 4495; 24 RT 4606.) He walked to the front of the vehicle. (23 RT 4495-4496.)

Some people came toward appellant from the direction in which Tommy ran. (23 RT 4496.) Appellant recognized one person as "Chuckie." Appellant greeted Chuckie, but Chuckie hit appellant. Appellant was stunned and surprised. Next, appellant was hit from behind. Then people jumped onto appellant. Appellant estimated that there were over five people attacking him. The people were gang members. (23 RT 4497; 24 RT 4608.) Appellant was stabbed, hit with beer bottles and sticks, and kicked. When appellant was on the ground, the people took the stereo out of the CRX. Because they could not find the keys to the car, they started damaging it. (23 RT 4498; 24 RT 4608-4609, 4614.) Appellant did not know how many times he was stabbed, although it was more than once. (24 RT 4609.) Some of the attackers hit the car with sticks, others jumped on the car. (23 RT 4499; 24 RT 4613-4614.) One person jumped on the hood. (23 RT 4500.) One person tried to break the back window. (23 RT 4500.) They kicked the hood, the door, and the fenders. They left him motionless on the ground and bleeding. Appellant pretended to be dead. (23 RT 4499; 24 RT 4611, 4615-4616.)

Items were removed from the CRX and put into someone else's car. The driver's door of the CRX was still open, and appellant still held the keys to the car. (23 RT 4501; 25 RT 4632.) Appellant managed to crawl into the CRX, and started the car. He pushed on the clutch with his hand and put the car in gear. He put his hand on the steering wheel, and used his other hand to push the gas pedal down. As the car rolled away, the attackers tried to stop appellant. However, he got away. He pulled himself into the car. Shots were fired at appellant as he left. Appellant did not recall how many shots were fired at him, but he was not shot and the CRX did not have any bullet holes. The people got

into their cars and chased after appellant. The approached appellant's car and fired shots. Appellant drove to the home of a friend because he was fainting and could not get to a hospital. When he arrived at the friend's home, he leaned on the horn. (23 RT 4502; 24 RT 4610, 4612.) The friend came out of the house because he had heard the shots. (23 RT 4503.)

When appellant was beaten by the gang members, he was bleeding from the side. The majority of the blood went into his jacket and down the side of his pants. Appellant believed that the blood went no further than the top of the pocket on his pants. He also was bleeding inside his mouth. Appellant did not lose his eyeglasses when he was beaten. He did not believe that he had blood on the seat of the car. The blood was on the inside of his leather jacket. Appellant did not know whether he would have cleaned the blood off the seat if any had gotten there. (24 RT 4619-4622.)

Appellant went to Huntington Memorial Hospital in Pasadena. He was there for a few days. His hospital records were under the name of "Michael Tucker." The people who followed him tried to go inside the hospital. While he was in the hospital, police officers came to speak with him. Appellant did not remember whether he told them anything the first time the officers came. The second day, police officers returned. He told the police officers the information that he knew about the attackers. (23 RT 4503; 25 RT 4630.) When asked to give the names of the people he reported to the detectives, appellant said that he "would be guessing." (25 RT 4631.)

Shortly after this incident, appellant went to live at his aunt's home. (23 RT 4504; 25 RT 4649.) He began carrying a shotgun in his car. (23 RT 4504; 27 RT 5054-5057.) A police detective named Valdez wanted appellant to testify against Chuckie. He also told appellant to carry a weapon. (23 RT 4505.)

Appellant admitted having participated in buying gasoline and using it to burn Tommy's car. (27 RT 5051-5052.)

c. Appellant's Testimony About The CRX

Appellant denied ever having louvers on the CRX. (23 RT 4500.) To install louvers on a car, there would be drill marks. His CRX did not have such drill marks. He denied knowing enough about car repairs to be able to repair or fill such drill holes. (23 RT 4501; 25 RT 4639-4640.) After the stabbing incident, appellant kept a shotgun in the CRX. He placed the shotgun behind the rear seat in a compartment. There is a long compartment built into the car. The compartment is the width of the two seats. (23 RT 4504.)

On one occasion after the stabbing incident, appellant went to a Black Angus Restaurant with Mike Arevalo, Paul Escoto, Ray Muro, and several others. (23 RT 4507-4508, 4534.) During the evening, Arevalo got in a fight and was kicked out of the restaurant by bouncers. Appellant did not see the fight because he was dancing. (23 RT 4508.) When appellant went outside, Arevalo was fighting with the people that he had been fighting with inside the restaurant, and Arevalo had appellant's shotgun that was kept in the CRX. (23 RT 4509, 4535.) Arevalo had taken the shotgun from the compartment behind the driver's and passenger's seats in the CRX. (24 RT 4535.) Arevalo also had appellant's keys from the Hide-A-Key. (23 RT 4509-4511; 24 RT 4534.)

In September 1994, after appellant healed from the stabbing, he took the CRX to Tijuana to have it repaired. The front end of the car was replaced with new front fenders and a new hood. Nothing else was replaced on the front of the car. A few "dings and dents" were taken out from the back side of the vehicle. Appellant did not have the rims, tires, or muffler changed. (23 RT 4506; 24 RT 4536; 25 RT 4640-4643.)

Appellant denied that the CRX had a loud muffler. The muffler was a "stock exhaust." He did not replace the muffler while he owned the car. The same muffler was on the car on October 22 and October 23 of 1994. (25 RT 4643-4645.) Appellant admitted that after the stabbing incident, and after he returned from having the CRX repaired in Tijuana, he had painted the CRX a dark gray primer color. (24 RT 4536; 25 RT 4669-4670.)

d. Appellant's Testimony About The Eyeglasses

Appellant denied dropping the eyeglasses that were found at the murder scene. (25 RT 4790.) Appellant had the eyeglasses on during the whole time he was at the party and had kept them on until he went to sleep at Ray Muro's house later that evening. (26 RT 4835-4840.) He put them back on when he woke up. He kept them on until he got money out of his wallet to go to breakfast. At the restaurant, he left the eyeglasses in the CRX and took his Rayban sunglasses. (26 RT 4840.) He next saw the eyeglasses later that night when he was at the Verdugo residence in Rialto. He needs the eyeglasses to see.[33] (26 RT 4841.) Appellant lost his eyeglasses while he was on the run from the police, but did not know where it was that he lost them.[34] (26 RT

---

33. Appellant got another pair of eyeglasses in Mexico while he was on the run. He did not remember the name of the store or the city he was in. He did not remember how close to the border he was. There was no prescription at the store, but they did examine his eyes through a computer. Appellant does not know how much he paid for the examination, but he did pay for it. The lenses were oval and clear. They were prescription lenses. Appellant said that they should be at his home. He "probably" received a receipt, but was unsure if he still had it. He did not remember how long before he came back to Rialto that he bought the eyeglasses in Mexico. (26 RT 4973-4976.)

34. Earlier in his testimony, however, appellant said that he had noticed the eyeglasses were missing before he went to Magic Mountain on the day of the murders. (25 RT 4790.)

4972.)

e. Appellant's Testimony Regarding Donna Tucker

Appellant never got along with Donna Tucker. They always fought against each other. Appellant hated Donna as much as she hated him. Donna used to "cuss out" and fight with his mother. Appellant protested when Donna married his brother Michael Verdugo. Appellant said that Donna lied about being the only one who could get in touch with Pauline because Michael also knows how to get in touch with Pauline. When Donna came to Thanksgiving in 1994. She did not appear fearful. She never got down on her hands and knees and pleaded with him to turn himself in. (24 RT 4558-4559; 27 RT 5039-41, 5086-5090.)

Appellant admitted having friends who were gang members, but he did not tell Donna Tucker about his gangmember friends. (24 RT 4598, 4600.) Appellant denied telling Donna that he would do anything for Mike Arevalo. (25 RT 4666.) Appellant did not talk to Michael Verdugo or Donna while he was on the run. (26 RT 4933-4935.) Appellant testified that most of Donna's testimony was lies. (27 RT 5027-5039, 5041-5043.)

f. Appellant's Testimony About Fleeing From The Police And His Arrest

At one point, appellant telephoned Detective Teague. Appellant was at a job site for his brother Michael Verdugo and Michael's wife Donna Tucker in Van Nuys when he made the call to Detective Teague. Appellant falsely told the detective that he was in Las Vegas. The reason appellant lied is because the police said that he was a witness to a fight that happened at a Halloween party. Appellant did not tell the police anything because he did not want to be

involved. He had just gotten through the stabbing incident and he and his family had just moved to Rialto. (24 RT 4557-4558; 26 RT 4863-4865.)

At some point, appellant found out he was wanted for murder. He did not turn himself in because he would be "questioned, pulled in." (24 RT 4559.) He was told not to deal with the police and to say nothing. Appellant fled. He was afraid he would be killed if he were caught and taken to jail. (24 RT 4560.) Appellant believed that if you are a rapist or snitch, you will not be protected in jail. (24 RT 4560.) Appellant explained that he waited to disclose who committed the murders because "I rather would wait until the last minute and let my family be prepared before anything happens." (24 RT 4561.)

Appellant denied being at the home of J.P. Hernandez when the police went there to arrest him. However, he had been there earlier in the day. Appellant's girlfriend Doreen had tried to call appellant while he was at Hernandez's home. Earlier in the day, Doreen had told appellant that she was with police officers who were looking for him. She spoke with Hernandez and said that she wanted appellant to meet her at Sharkey's. Appellant told Doreen that he would meet her at her house. Doreen did not tell appellant why she wanted to meet him at Sharkey's. She did not seem nervous. Appellant never went to Sharkeys. He knew that the police were looking for him. Appellant did not know that the FBI was looking for him. When appellant was at Hernandez's home, he did not see the police officers drive up or drive in the neighborhood. (26 RT 4881-4890.) Appellant later spoke with Doreen and told her what he was being accused of. He told her that he did not do it. He also said that he would "straighten it out later on." She wanted him to elaborate about the accusations, but he refused. He told her that he was a witness to a fight and that was all that he had seen. (26 RT 4891-4892.)

Appellant fled in December of 1994. (24 RT 4562.) He began moving to different motels. (26 RT 4880.) He used money that he saved for a new

truck, but appellant could not remember how much money he had saved. (26 RT 4880, 4896-4898.) Sal sent appellant money as well. Appellant could not estimate the total amount of money Sal sent him, but he estimated that it was sometimes five hundred to a thousand dollars each month.[35] (26 RT 4946-4957.) Appellant did not have any identification because he did not want to be stopped and identified as Nathan Verdugo. At the motels, appellant did not use the name Verdugo. He used combinations of James or John and Nathan as his first name. (26 RT 4919-4921.)

Appellant saw "bits and pieces" of the news broadcast mentioning him and accusing him of the double murders. Appellant also read newspaper accounts. On several occasions, he tried calling "one phone number" that he had for the police. When he called, an answering machine would answer. Appellant believed that he left a message on one occasion, but the other times he hung up and did not leave a message. He would call at night because he was only able to get to a phone at night in that he slept during the day and did not go outside of his hotel room during the daytime due to the extensive media coverage. Appellant chose not to use the telephone in his hotel room, but used pay phones because the hotel phone cost more than the pay phones. (26 RT 4901-4907.)

The first motel appellant stayed at was near Rose Hills Cemetery near Pico Rivera. He did not know the name of the motel. He stayed at so many motels that he did not pay attention to the names. Appellant also did not know what street the motel was on because he had a taxi take him there. He stayed in his room for the whole time except to go out to eat. (26 RT 4898-4900.)

---

35. At one point, appellant testified that Sal would wire money to check cashing places. Later, appellant testified that Sal did not wire money. Sal tried once, but appellant was too afraid to pick it up. (26 RT 4943-4945.)

After staying at that motel for two weeks, appellant went to another motel in Pico Rivera across the street from a 76 gas station and a Pic-N-Save. He stayed at this second hotel for a couple of days. Appellant did not know the name of the motel, but he told his father and brother where he stayed. He called them every day or every other day. From there, appellant went to another motel in or near West Covina. The motel was located off the 10 Freeway near a truck stop and a restaurant, but appellant did not know the name of the motel. (26 RT 4922-4925.)

After staying in West Covina for a while, appellant traveled by Greyhound Bus to Phoenix, Arizona. Appellant used a false name when he purchased his bus ticket. Appellant stayed by himself in a motel near the airport. While in Arizona, appellant looked for relatives in Phoenix as well as Scottsdale and Mesa. Appellant did not find any relatives. He would call his father and brother. Appellant stayed in Arizona for about a month, but did not remember the name of the motel he stayed in. (26 RT 4924-4927.)

From Arizona, appellant traveled by Greyhound Bus to San Diego. He stayed in San Diego for approximately five months until he returned home. He stayed at various motels, one of which he believed was a Motel 6. He did not go outside in the daytime. Appellant tried to call the police a couple times after he returned to California. Appellant did not see his picture in the newspaper or on television, but he saw an article about the crime in a Spanish newspaper. (26 RT 4927-4929.)

Later in his testimony, appellant said that he was not sure whether he stayed in San Diego. Rather, he was "guessing" that he stayed there. Appellant stated, "I'm guessing on everything that you've been asking me." (27 RT 5043.) He also said that he was guessing whether he stayed in Mexico and Arizona. Appellant said that he lied during his testimony about being in San Diego and from where he was getting money. (27 RT 5044.) Appellant said,

"Look, all I know for sure, I'm a liar, a storyteller, but I'm not no killer."[36] (27 RT 5045.)

While on the run from the authorities, appellant was worried about the news coverage broadcasting his name. (26 RT 4911-4912.) He changed his appearance by growing a beard and mustache and letting hair grow. After a month, he cut off the beard and left the mustache. (26 RT 4929-4931.) He went to Mexico while he was living in San Diego. He walked around during the day and then returned to San Diego at night. He went to Mexico a few times. (26 RT 4931.) He did not see anything in Mexican newspapers about him or the crimes. (26 RT 4955.) He also did not see any reports about him on television or hear any reports about himself while he was in Mexico. (26 RT 4955-4956.) He did not spend the night in Mexico. Once he took a bus to Oceanside to see his sister Mary Alice, but upon arriving, he went to the beach. He did not talk to her. (26 RT 4932.)

Appellant was worried about Ray Muro having told him that he "took care of business" and that Muro killed the victims while Paul Escoto was with him. Appellant was scared that Muro, Mike Arevalo, and Arevalo's friends retaliating against him and his family. (26 RT 4911-4917.)

When appellant ran out of money while in San Diego, he took a Greyhound bus back to San Bernardino. He did not tell Sal or anyone else that he was coming home. From the bus station, appellant took a taxi to a nearby house. Then he went to the Verdugo residence in Rialto. Paul Verdugo was there. It was morning, and the sun was up. Sal had not yet returned home from

---

36. On redirect, appellant testified that it was true that he was in Arizona for a month and in San Diego for a month. The reason he testified about guessing during cross-examination is because he talked to his family and believed that his testimony about Sal and Paul helping him would subject them to prosecution. (27 RT 5077-5079.) Appellant admitted that he lied during his testimony, but said that he had explained where he had lied. Appellant said, "Everybody calls me a liar." (27 RT 5101-5106.)

work. Paul was surprised to see appellant and tried to call Sal. Appellant did not go with Paul anywhere that day. He took a nap in Sal's bedroom. When appellant awoke, he was going to take a shower. While in the bathroom, appellant learned that the police were going to enter the house. (26 RT 4942, 4957-4964.)

Appellant could see a lot of police officers in black uniforms in his neighbor's yard. The officers had assault rifles. Paul told appellant that he was going to walk outside and talk to the officers. Appellant panicked and crawled into a hiding space in the closet.[37] Nobody helped appellant get into the hiding space. After crawling inside, he pulled the part of the wall in front of him. Paul did not put any blankets inside the hiding space. (26 RT 4965-4967.) Appellant could not explain how he got the shelves in place in the closet from his position in the hiding space. (26 RT 4968-4971, 4977-4982.) Appellant said that he would be "guessing" if forced to explain how he put the shelves on. (26 RT 4976-4977.) Appellant denied that he was lying. He simply could not remember the "details." (26 RT 4977.) Appellant denied having a water bottle or flashlight in the hiding space. (26 RT 4982-4984.)

After his arrest, appellant was taken into custody and brought to an interview room by Detective Teague.[38] Detective Teague told appellant before entering the interview room that he had shot appellant's brother during the search of the house. (24 RT 4563.) Appellant admitted that many of the

---

37. Appellant's brother Michael Verdugo built the hiding space in the closet when the family moved to the house. Appellant denied that the crawl space was built for him to hide in. The only time he hid in the closet was the day he was arrested. (27 RT 5054.)

38. The audiotape of the interview was played for the jury. The jury was instructed that they may not consider the interview statements for the truth of anything said, but only for determining appellant's believability. (26 RT 4990, 4993, 4995.)

statements he made to the police were lies. (26 RT 4995-5009, 5013-5017; 27 RT 5095-5097.)

Appellant lied when he told the police he was in his truck at the party. He did not want to tell the police about the CRX because then he would have to explain everything else. Appellant purposely tried to keep Mike Arevalo and his friends from getting implicated in the crimes. (26 RT 5010-5011.) He lied by telling the police that he went home to Rialto the night of the party. To do otherwise would "bring in" Arevalo, Ray Muro, Arevalo's father, and Arevalo's father's girlfriend. (26 RT 5012.) Appellant wanted to protect Arevalo and his friends and family. (24 RT 4567, 26 RT 5015.) Appellant panicked. He felt like he was being framed and that nobody would believe him when he said that he lost the eyeglasses he wore to the party, so he arranged for the purchase of the eyeglasses that Paul testified about having found after his arrest. (24 RT 4569.)

Appellant admitted that he had sent letters to his sister. In the letters, appellant stated the following: he was moving a lot, and not staying in one place for too long; the police were looking for the CRX, but would not find it; he did not look the same; there were photographs in the newspapers; English and Spanish newspapers had stories about the murders; there were stories about the murders on the radio; he went from city to city at night; the police had the shotgun shells with his fingerprints on them; he knew that the police had his fingerprints because the police took his shotgun; the police had a pair of his eyeglasses; he would keep running and running; he would be in Nevada and Arizona; he needed an ID; he was looking for a birth certificate with a different birthday; and he needed to start a new life. (27 RT 5057-5066.) When appellant was arrested, he had an unmailed letter in his pocket written to Pauline. In that letter, he told Pauline to destroy everything. (27 RT 5067.)

2. Other Defense Evidence

a. Detective Ewing Kwock

Detective Kwock had interviewed Donna Tucker before the trial at the Los Angeles Police Department Devonshire Station. The first he had ever heard her say that appellant's CRX had louvered windows was during her testimony in court on June 17, 1997. Donna had been cooperative during her interview. Although she did not volunteer information about body damage to appellant's CRX, she also was not asked for such information. Detective Kwock helped the deputy district attorney set up an interview of Donna at the Devonshire Station. (23 RT 4398-4400.)

b. Detective Teague

When Detective Teague arrived at the murder scene, he spoke with some of the fire fighters, but not Donald Jones. On October 26,. 1994, at approximately 9:15 a.m., Detective Teague interviewed Jones by telephone. During the interview, Jones did not tell Detective Teague that he saw the suspect standing over the victim's body. Jones said that he saw the suspect running northbound. If Jones had said that he saw the suspect standing over the victim's body, Detective Teague would have written that information down in his notes of the interview. Jones said that the suspect wore a long-sleeved blue shirt. (23 RT 4409-4411.)

Jones did not tell Detective Teague that he could identify the face of the suspect if he had an opportunity, but Jones said that he could identify the suspect's body shape and possibly the suspect's vehicle. Jones described the suspect as about 5 feet 9 inches tall, 160 pounds. Jones did not state that he was guessing or estimating the size of the suspect. However, Detective Teague also testified that Jones said that because he was on the second story of the fire

station, looking out the window down to the sidewalk, quite a distance below him, his height perception could have been off.[39] Jones said that he believed the suspect's car was dark and had louvered windows. With the information he received from Jones and the other firefighters, Detective Teague began an investigation for a two-door, black vehicle with a loud exhaust system and louvered windows. (23 RT 4412-4415, 4434.)

Detective Teague did not recall whether Jones said that the suspect looked clean-cut. Jones did not mention the length of the suspect's hair. Jones said only that the suspect had dark hair. Jones did not say whether the suspect was light complected. Had it been mentioned, Detective Teague would have written a note about it. (23 RT 4416-4417, 4419.)

On October 24, 1994, Detective Teague also interviewed Alex Quintana, who was one of the firefighters in the fire station at the time of the shooting. Quintana said that the suspect was about five-foot-nine. Quintana also said that the suspect possibly was 5 feet 9 inches or 5 feet 10 inches tall. He also said that was his best estimate because he was on the second floor looking down at the incident. Detective Teague did not write any notes about why Quintana had difficulty in estimating the suspect's height. Quintana told Detective Teague that he saw the suspect standing over the female victim and shoot her in the head. Quintana said that the suspect was wearing a copper shirt and black pants. He believed that the suspect was well dressed. He also believed that the suspect had dark skin tone. In reference to the suspect's car, Quintana did not mention the term CRX, but said that it was either a Honda Civic or a Toyota. (23 RT 4420-4422, 4436-4437, 4439.)

Detective Teague interviewed Ray Muro, but Muro was not cooperative. At a first interview, on October 27, 1994, Muro did not give any information

---

39. Detective Teague did not write any notes about Jones's explanation regarding his perception of the suspect's height. (23 RT 4435-4436.)

regarding the case. The first interview was no longer than ten minutes. Detective Teague learned that Muro and Irma Casas, the woman who threatened Adriana, were together during the time the murders took place. (23 RT 4424-4426.) At a second interview, Muro said that when he saw appellant at his home later in the evening after the Halloween party, appellant had told him that the situation had been handled. (23 RT 4482-4483.)

On October 27, 1994, Detective Teague interviewed Paul Escoto at Escoto's apartment on Marguerite. Escoto said that he was at the top of the hill with Monica Tello. Detective Teague told Escoto that he had information that Escoto had had a "squabble" with another guest who was wearing a Kennedy mask, and that he picked up a smaller man by the shirt. Escoto said that he recognized somebody who was in the Kennedy mask on the street outside the party with some other people. Escoto had denied knowing that he hit the girl with his car. He did not tell Detective Teague that "some guys" in the street threw a bottle at his car. He also did not say that appellant's car was at the top of the hill. Detective Teague did not believe that Escoto told him that he knew appellant. (23 RT 4427-4430, 4439.)

Detective Teague spoke with Donna Tucker during his investigation in December of 1994. From December 1994 to December 1996, Donna had not told Detective Teague that appellant had a car with louvers on the back. It was not until Donna's testimony on June 18, 1997, that Detective Teague first heard Donna say that appellant had louvers on his car. Detective Teague does not remember whether he had asked Donna if appellant had louvers on his car. (23 RT 4430-4432.)

c. Detective Markel

Detective Markel had many contacts with Donna Tucker during his investigation. (23 RT 4444-4445.) When asked if Donna had told him whether

appellant had killed two people, he responded "not exactly." If she had told him that, he would have written such information in his notes. (23 RT 4445-4446.)

During the conversations that occurred with Donna Tucker between December of 1994 and January of 1997, Detective Markel "vaguely remember[ed]" Donna saying that she had seen appellant's CRX. Detective Markel did not write any interview notes to that effect. He did not recall Donna telling him that she saw louvers on appellant's car. Detective Markel remembered one of the witnesses saying that he had made such an observation. He did not recall asking Donna whether she had seen louvers on the back of appellant's CRX. The first time he discovered that Donna had seen louvers on the back of appellant's car was during her court testimony two days earlier. Detective Markel did not remember whether he asked anyone whether they had seen louvers on the back of appellant's car, but he is sure that the question had been asked of someone familiar with the car. (23 RT 4454-4457.)

One interview with Donna Tucker was tape-recorded because she was concerned that something would happen to her. Donna had been concerned for her safety for some time. She said that she had seen appellant in Rialto two days before appellant was arrested. Detective Markel did not recall whether Donna said that she knew appellant was there or that she was fearful of appellant, but Donna was fearful of Sal. Sal was at the Rialto house when she got there. She did not tell Detective Markel whether she knew Sal would be there. She also said that she was fearful of Paul. She did not tell Detective Markel whether Paul was there. (23 RT 4478-4481.)

Detective Markel had an opportunity to look at Richard Rodriguez's car. He believed that there was a silver and white substance of some sort on the car. He also believed that it was a possibility that the substance came from the car that hit Richard's car. (23 RT 4458.)

Detective Markel's interview of Juan Enciso at the Hollenbeck Station took from an hour and a half to two hours. Enciso did not tell Detective Markel that appellant's car had been damaged in a collision on the day of the interview. He did not tell Detective Markel that appellant's car was being worked on because it was damaged on that date. At a second interview, Enciso told Detectives Markel and Teague that appellant's car was damaged in an accident. (23 RT 4466-4468.)

d. Richard Marouka

Marouka is Los Angeles Police Department criminalist assigned to the Firearms Analysis Unit as a forensic firearm examiner. He has a specialty in firearms and shotguns. Marouka testified on behalf of the prosecution during the prosecution's case-in-chief. He explained that if a person is shot in the head from close range with a shotgun, the head will explode in what is known as the "watermelon syndrome." Body substance will explode backward as well as forward. Marouka opined, after reviewing a photograph of one of the victims at the scene of the murder, the direction of the shot was "upstream" from the victim. (16 RT 2912; 23 RT 4461-4463.)

e. Ray Muro

On the night of the party, Ray Muro drove home with Mike Arevalo, Arevalo's father, and Arevalo's father's girlfriend. Muro had been drinking that night. When he got home, he stayed up, but he did not watch television. The next morning, he went to breakfast with appellant and Arevalo. When Arevalo returned to the table and informed them that the murders occurred, Muro did not finish his breakfast and felt sick to his stomach. Muro thought appellant may have been responsible for the killings because he had seen appellant with the shotgun. Appellant did not tell Muro that he thought Arevalo

took his shotgun. Muro did not tell appellant that he and Paul Escoto took care of things and he did not tell appellant that his training in the Marines had paid off. Appellant did not ask Muro for the shotgun, and Muro did not know where the shotgun was. (24 RT 4572-4575, 4577-4578.)

f. Mary Alice Baldwin

Mary Alice Baldwin, appellant's eldest sister, is fifteen years older than appellant. She was a licensed vocational nurse living in Oceanside. Mary Alice, Michael, Paul, Pauline, and appellant had the same mother. At the time of her mother's death in 1982, Mary Alice lived with her father Sal, Paul, Pauline, and appellant. She took over her mother's role as housekeeper. She moved out of the house in late 1986 or early 1987 when appellant was fifteen years old. She has a good relationship with appellant. She kept in contact with the family after moving out. (28 RT 5216-5219, 5248-5249.)

Mary Alice had known Donna Tucker since 1973. Donna started dating appellant's brother Michael Verdugo when he was fifteen and Donna was seventeen. Appellant's mother did not like that Donna was older than Michael. She said that if they needed to date seriously, she should wait until Michael was out of school. Donna and appellant's mother would yell at each other and their arguments would escalate. (28 RT 5219-5221.)

Appellant was in elementary school when his mother died. Mary Alice would go to his parent-teacher conferences. She changed her work schedule so she could be home after school hours to make sure that appellant's homework was done. She helped appellant if he had problems with English or math. She would take appellant to school and pick him up from school. Appellant has a learning disability that affected his spelling. (28 RT 5228-5230.)

Donna Tucker did not take over the mother role for appellant. She was Michael Verdugo's girlfriend. She would come by to visit Michael. When

Donna and appellant's mother argued, appellant would go to Mary Alice and asked why Donna was yelling at their mother. (28 RT 5230.)

When Mary Alice learned appellant had been stabbed in 1994, she saw him in the hospital. She drove appellant's CRX back to Oceanside. There was some damage to the front of the car, but the lights on the car worked. The car did not have louvers on the back window. Mary Alice drove the car to the Verdugo residence in February of 1994. She saw the car later in the summer when the Verdugo family had just moved to Rialto and the car did not have louvers. (28 RT 5230-5233.)

At some point, Mary Alice spoke with Detectives Teague and Markel about the case at her home. About a month earlier, appellant had come to Mary Alice's house to clean some of her carpets. Appellant did not tell her anything about the case. When she spoke with the detectives, Mary Alice had not seen any news accounts about the case and Sal had not told her that appellant was wanted for the murders. The detectives were the first to tell Mary Alice that appellant was on the run. They said that they wanted to speak with appellant regarding a fight at a party. After speaking with the detectives, she called Sal and asked him about the situation. Sal confirmed that, as the detectives had mentioned to her, the police wanted appellant for questioning about a fight at a party. Sal said that "it's no big deal" and "everything is taken care of." Mary Alice tried paging appellant, but there was no response. Later in the afternoon, appellant called Mary Alice. She told him to talk with the police because they were at her house looking for him. Appellant said that he could not talk to the police because "they're after me." Mary Alice said that he was just a witness to a fight. The next time Mary Alice spoke with appellant was at Thanksgiving at Sal's house. Appellant said that he was fearful for his life, he had been threatened, and that he and the family would be killed if he testified. Appellant said that Ray Muro and Paul Escoto committed the murders. They took his

shotgun and shot the victims. They wanted appellant to "shut up" or they would kill him. Appellant was afraid that they were going to kill the family. Appellant denied committing the murders. (28 RT 5233-5235, 5237-5241, 5258-5266.)

In 1995, Mary Alice spoke with Donna Tucker about her relationship with Michael Verdugo. Donna said that she no longer loved Michael and wished she had not gotten married. Michael had had an affair shortly after they were married. Donna hated Michael because he was having affairs behind her back. Michael also was working two jobs to try and make ends meet because she did not work. Donna was angry that there was not sufficient money to fix their house. Mary Alice no longer speaks with Donna. (28 RT 5243-5248.) Sometime before Donna had left Michael, Donna told Mary Alice that appellant said he committed the murders. (28 RT 5273.)

The last time Mary Alice spoke with appellant was several months before he was arrested. She had gone to visit Sal briefly in Rialto, but she did not know that appellant was there. Sal and Paul also were at the house. She did not want to get involved, but she knew that the police were looking for appellant. Mary Alice was led to appellant's room by Paul. She was surprised to see appellant him. Mary Alice asked appellant to turn himself in and straighten the situation out. Appellant said that he was afraid. He said that if he talked and turned himself in, Ray Muro and Paul Escoto were going to kill the family. Appellant was not hiding in a closet when he talked to Mary Alice. Nobody told Mary Alice about the hiding space in the closet, and she only heard about the hiding space after appellant was arrested. Mary Alice did not know who built the hiding space or whether it had been built for appellant. Mary Alice did not call the police because appellant said that the family would be killed if appellant was arrested. Mary Alice was petrified and avoided the family. She had not received any threats personally, but family members in El

Sereno had been threatened. (28 RT 5266-5271.)

Mary Alice did not know whether appellant owned a shotgun and she never saw a shotgun in appellant's CRX when she drove it while appellant recovered from the stabbing incident. When Mary Alice saw appellant in Rialto before his arrest, appellant said that he had kept a shotgun in the CRX and that Ray Muro and Paul Escoto had taken it. Mary Alice did not tell the police about the shotgun being taken by Muro and Escoto. Later, she spoke with the police and told them that appellant was innocent. She also told them that she had seen appellant at the Verdugo residence in Rialto. She did not tell the police about Muro and Escoto because she did not know their last names. (28 RT 5273-5279.)

She had never heard Paul or Sal say that they went all the way for appellant. Mary Alice later learned that Sal was concerned about who gave the police information about appellant and he thought it might have been her. (28 RT 5279.)

C. Prosecution's Rebuttal

Mary Alice Baldwin testified that at some point she had told a police detective that appellant said he was shot at while driving home on the Long Beach Freeway. Appellant told her that he fired back because it was "either him or me" and that he tried to get away from the assailants. He was driving in the CRX at the time, and the CRX had a personalized license plate. (28 RT 5285-5294.)

Detective Markel spoke with Mary Alice on May 23, 1995, at 8:45 p.m. He had received a call from Donna Tucker Tucker earlier in the day saying that Mary Alice wanted to speak with him and that he should call Mary Alice at her home at approximately 8:00 p.m. Mary Alice told Detective Markel that Donna was giving information to the police and that Donna was afraid that this was

going to break up her marriage. Mary Alice also said that she was at Sal's house in Rialto about a month earlier, she followed Paul upstairs, and when she got upstairs, she saw appellant. Appellant told her that on one occasion he was going home on the Long Beach Freeway when there was gunfire. Appellant said the assailants were "shooting at me. It was either him or me." Mary Alice did not tell Detective Markel that appellant said that he was innocent. He would have written it on his notes if she had. Mary Alice also did not tell Detective Markel about any other person being responsible for the murders, and she did not mention the names of Muro or Paul Escoto. (28 RT 5294-5305.)

Detective Teague testified that there are two ways to apply louvers to a car window. One way is to drill holes and screw the louvers in. The other way is use a double sided adhesive After he took possession of the CRX, Detective Teague could not tell whether the car had louvers six months earlier when the crime occurred. (28 RT 5319-5320, 5324-5325.)

D. Stipulation

The parties stipulated that on July 15, 1996, Fireman Donald Jones was interviewed by Detectives Markel and Kwock. In part of his statement he said that as he was lying on his bed he heard arguing outside, and the arguing continued. He heard the voices of a male and a female get louder, they got closer and more heated. The witness heard a gunshot, followed by the female screaming no, no, no, and then he heard another gunshot. During this exchange Jones got up out of his bed and approached the window on the west wall. Firefighter Quintana was already looking out the window at the time. (28 RT 5281.)

I. PENALTY PHASE

A. People's Case

1. Testimony Of Richard Rodriguez's Family

Robert Rodriguez, Jr., a cousin of Richard Rodriguez, grew up with Richard. Richard was one year older than Robert. Robert looked up to Richard because Richard had direction in his life. Richard wanted to graduate from college and have a family. When Robert heard that Richard had been killed, he cried and hoped that it was a mistake. Richard would "crack a lot of jokes" and "always tried to make people happy around him." (31 RT 5796-5805.)

Cynthia Rodriguez, another cousin of Richard, was only eleven or twelve years old when Richard was murdered. Richard was special to her because he "just always [would] be there with a smile, just want to sit down and talk to you. It could be the best day of your life, he just made it better." (31 RT 5806-5807.)

Richard's aunt, Martha Rodriguez, had a son Nicholas. Richard was Nicholas's godfather. Nicholas was only three years old when Richard was killed. Richard would take Nicholas out to eat and always had time for Nicholas. After Richard was killed, Nicholas would ask Martha where Richard was. (31 RT 5810-5814.)

Richard would go to the home of his uncle, Robert Rodriguez, while he was growing up. At the time of his murder, Richard had received a grant to attend Cal State LA, and had already begun attending classes. Robert made the arrangements for Richard's funeral, but he had to borrow money to pay for the funeral. (31 RT 5818-5827.)

Carmen Evangelista, Richard's mother, said that Richard planned to be an engineer. He was never in gangs and was never arrested for anything. (31 RT 5829-5833.)

On the night of the party, Carmen asked Richard to stay with the children who were at her house while she went to the store. He said that he had been invited to a party, but was not sure whether he would go. She did not see him or speak with Richard again. At approximately 3:00 a.m., one of Yolanda's sisters called her to say that Yolanda and Richard had not yet gotten home. Carmen gave her Richard's pager number. Carmen also paged Richard, but she did not receive a response. Yolanda's sister called again and said she thought there was an accident on Monterey. Yolanda's sister called back later and told Carmen that Richard's car was there. Carmen drove to the murder scene and saw Richard's car there. She tried to tell officers at the scene that she knew the owner of the car. Eventually, Detective Teague came over to her. Carmen told Detective Teague that she knew the owner of the car and told the detective her address and Richard's name. Detective Teague told her to go home and that he would contact her if Richard was a victim. All Carmen could see was the yellow police tape. Carmen went home and waited. Later, Detectives Teague and Markel came to the house and informed her that Richard had been killed. After Richard's body was released, she went to view the body. (31 RT 5839-5843.)

2. Testimony Of Yolanda Navarro's Family

Ernestine Chavez was Yolanda Navarro's sister and best friend. Yolanda would help take care of Ernestine's children, Christine and Andrew. Christine was four years old and Andrew was one year old when Yolanda was murdered. Yolanda was a godmother to Christine. Throughout her senior year in high school, Yolanda talked about pursuing a career as a nurse or working with children. (32 RT 5872-5882.) Ernestine helped pick out a coffin for Yolanda, a burial location, and the clothes that she would be buried in. (32 RT 5886-5892.)

Yolanda's brother, Jonathan David Rodriguez, was on his way to a friend's house when he heard the shots fired by appellant. He thought it would not be safe to be outside after hearing the shots. As he walked back home, he saw the bodies of Yolanda and Richard. He saw Richard first and observed that he was dead. He then went to Yolanda and saw that "they blew her brains out," but he did not yet recognize her. Eventually, Jonathan began to realize that it was Yolanda. He went across the street with a firefighter who had arrived. Jonathan telephoned his mother and asked her to page Yolanda. A little while later he heard the pager go off across the street. He then knew that the female victim was Yolanda. Yolanda was going to start working in a hospital the following Monday. (32 RT 5893-5897.)

Armida Navarro was Yolanda's mother. On the night Yolanda was murdered, Jonathan telephoned her and asked whether Yolanda was home. She said that Yolanda was not home. He told his mother to "beep her and see if you can find out where she is." Armida paged Yolanda, but Yolanda did not answer. After several other attempts, Jonathan told Armida to come to the fire station. He was waiting for her and he was crying. Armida did not know why he was crying. Armida went home again to page Yolanda. She then returned to the fire station, but the area was blocked off. Armida returned home and became sick. She had to go to the hospital. While Armida remained at the hospital, Yolanda's father went to the fire station where he was told that Yolanda was one of the victims. Ernestine came to the hospital and said that Yolanda was lying in the street at the crime scene. Yolanda's casket was closed at the funeral. Yolanda's father died about seven months later. A car wash was held in honor of Yolanda and Richard. (32 RT 5908-5953.)

Yolanda and her friends got together at her house on the day of the party. They were recording music. Richard came over. The girls were looking at themselves in the mirror getting dressed. Yolanda's father came home and she

gave him the recording. All of the songs on the cassette were about losing someone, leaving someone, having to say goodbye, losing one that was loved and trying to get them back. Students at the school had a memorial for Yolanda and Richard. (32 RT 5953-5963.)

B. Defense Case

William Terrence Wright, a friend of appellant, had known appellant when he was a child. As a child, appellant was very quiet, very respectful, and somewhat studious. He was interested in electrical items such as radios. Wright never saw appellant bully anyone. Appellant always was doing a job to earn some money. Other than his experiences with Donna Tucker, appellant appeared to be happy and industrious. (33 RT 6061-6065.) Wright also was friends with Paul Escoto. Appellant, Escoto, and Mike Arevalo were normal. Wright, however, did not know about the incident where appellant set fire to another person's car. (33 RT 6065-6066.) Wright would go to Sal's house a few times week. He would occasionally help appellant with his homework and would answer questions if appellant had any. However, Wright did not spend too much time with appellant during his visits because of their age difference. When Wright helped appellant with his homework, appellant seemed to be normal and did not have problems more than any other child in school. Wright had spent seven years as a special education assistant, and believed that appellant did not need any special education. (33 RT 6083-6089.)

Wright did not know appellant to lie to him or be violent toward Donna Tucker or anyone else. Wright denied knowing what appellant had been charged with in this case and what appellant had been convicted of. Wright did not know any of the details of the crimes. He had only heard that appellant had been convicted. (33 RT 6089-6092.)

Appellant's brother Michael Verdugo found appellant to be a "good kid" while he was growing up. Michael would take appellant to school and give him rides home. During the summer, appellant would work for Michael on construction sites. If Michael sent a group of kids to a wrestling camp, he would send appellant too. Appellant was very helpful. He was not a bully. He was good at following orders and good with his hands. (33 RT 6096.) Michael opined that appellant would be productive in prison if given a sentence of life without the possibility of parole. Appellant had no criminal record and was not part of a gang. The family was "too close" and would have "made sure that that would never have happened." (33 RT 6096-6101.)

Michael Verdugo denied building the hiding space where appellant was when he was arrested. He knew that there was some space created in the house for valuables and safekeeping of items. He learned about the space after the neighborhood was broken into quite a few times. (33 RT 6106-6108.)

Michael Verdugo believed that the family would do anything to keep appellant from "getting railroaded." Michael was familiar with the charges and what appellant had been convicted of. He believed that appellant would lie to protect Sal and that Sal would lie to protect appellant. (33 RT 6108-6109.)

Mike had no knowledge of appellant having been previously convicted of a crime. He knew, however, that appellant bought gasoline and set fire to another person's car. Mike believed that appellant is not a vengeful kind of person. Mike never saw appellant handle a shotgun, but he knew that appellant owned two shotguns. (33 RT 6109-6113.)

Mary Alice Baldwin said that before their mother died, appellant was a "real good kid" who was sweet, lovable, very happy, and everyone's friend. After the death of their mother, appellant got a lot more quiet. He became introverted and preferred sticking close to the family. She and appellant got a lot closer. Appellant was not violent, a bully, or involved in gangs. (33 RT

6131-6136.)

Appellant had a hard time comprehending school work. He had trouble spelling. He could be productive in prison. (33 RT 6136-6137.)

After the death of their mother, Mary Alice also supervised Paul and Pauline. Pauline did not commit any murders. Mary Alice did not know until the time she gave her penalty phase testimony that appellant bought gasoline and set fire to another person's car. When asked if she would describe this conduct as violent, she said "I wouldn't know what to call it." She taught Pauline and appellant right from wrong. Mary Alice knew that appellant's eyeglasses were at the murder scene with his jacket after he was stabbed. (33 RT 6137-6145.)

Mary Alice did not want to take in appellant while he was on the run. She worked two jobs and attended school full time. She did not know that appellant was charged with murder until he was arrested. Mary Alice did not want to believe that appellant had been charged with murder. She did not want to know the details of the crimes. (33 RT 6148-6154.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR SECOND COUNSEL

In his first claim, appellant argues that the trial court prejudicially erred in denying his confidential application for second counsel. (AOB 82-100; see 12 CT 3029, 3060, 3067-3069.) Appellant contends that the trial court's error denied him the constitutional right to due process, a fair trial, effective assistance of counsel, reliable determination of guilty and penalty, and fundamental fairness. (AOB 82-100.) Respondent submits that the trial court properly denied the request due to counsel failing to provide specific factual reasons why appointment of counsel was necessary.

Penal Code section 987, subdivision (d), provides that in a capital case, "the court may appoint an additional attorney as co-counsel upon a written request of the first attorney appointed." The first attorney must support the request with an affidavit "setting forth in detail the reasons why a second attorney should be appointed." The court "must" appoint the second counsel when it is "convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation."

This Court, in *People v. Staten* (2000) 24 Cal.4th 434, stated that "'[t]he initial burden, however, is on the defendant to present a specific factual showing as to why the appointment of a second attorney is necessary to his defense against the capital charges.'" (*Id.* at p. 447 (quoting *People v. Lucky* (1988) 45 Cal.3d 259, 279.) A mere "'abstract assertion' regarding the burden on defense counsel" is insufficient to establish genuine need for second counsel. (*People v. Staten*, *supra*, 24 Cal.4th at 447, quoting *People v. Lucky*, *supra*, 45 Cal.3d at 280).) Denial of a request for second counsel is reviewed for abuse of discretion. (*People v. Staten*, 24 Cal.4th at p. 447.)

In *Staten*, the application for second counsel that was at issue was supported by a declaration from the defendant's attorney stating that "there are both serious issues for the guilt and penalty phases of this trial and it is therefore necessary for the court to allot funds to cover the cost of a second attorney to handle different parts of both phases of this trial." (*People v. Staten*, 24 Cal.4th at p. 446.) During the hearing regarding the application, the defendant's attorney argued that the "case involved strictly circumstantial evidence and that the burden of going through a guilt phase, the circumstantial evidence, the possible inferences, the possible investigation, the numerous people that were used at the preliminary hearing and all the investigation that would be necessary in a guilt phase supported appointment of second counsel to help him prepare in case a penalty phase is necessary." (*Ibid.*)

On appeal, the defendant argued that the superior court erroneously denied the application because, with second counsel, he would have been able to present a more effective guilt and penalty phase case. (*People v. Staten, supra*, 24 Cal.4th at p. 447.) This Court held that no abuse of discretion occurred because the application "consist[ed] of little more than a bare assertion that second counsel was necessary, did not give rise to a presumption that a second attorney was required; [and] presented no specific compelling reasons for such appointment." (*Ibid.*)

Similarly, in the present case, appellant's application for second counsel was bereft of a specific factual showing why second counsel was needed. Appellant's trial counsel stated in his application that "[t]he facts and issues involved in this case are sufficiently complex to necessitate the appointment of counsel." (12 CT 3067.) Counsel, however, did not specify which facts and issues were "complex" in the case such that second counsel needed to be appointed. Appellant's trial counsel stated that second counsel was necessary to "adequately assist in supervising and assimilating information and facts

developed by investigators, both law enforcement and defense, from witnesses involved herein, and from experts, as well as to adequately interview witnesses and prepare the necessary motions and the subsequent hearing." (12 CT 3067.) Counsel, however, did not specify which witnesses he was referring to or what motions would have to be prepared.

Appellant's trial counsel stated that second counsel was needed because the case "involve[d] issues of such legal complexity, that adequate representation will require extensive research and motion practice preceding trial." (12 CT 3068.) Although appellant's trial counsel identified an attorney who apparently was willing to serve as second counsel, appellant's trial counsel failed to specify which issues were complex and why they were of such complexity that second counsel was needed. Appellant's trial counsel stated that preparation for the guilt phase would require "investigation of the conduct and acts of the various parties on the date of the crime [and] also over an extensive period extending both before and after the date of the crime" and that "interviews of numerous witnesses" would have to be conducted. (12 CT 3068.) Trial counsel failed to specify which witnesses he was referring to and why second counsel was needed to conduct such investigation. Appellant's trial counsel also stated that second counsel was needed to simultaneously investigate "penalty phase mitigating factors and issues which are highly involved and complex." (12 CT 3068.) Trial counsel, however, failed to specify which issues he was referring to, why they were "highly involved and complex," and why second counsel was necessary to conduct such investigation. Appellant's trial counsel stated that he had "weaknesses" that would be offset by appointment of second counsel. (See 12 CT 3075-3077.) However, trial counsel did not specify what those weaknesses were and why appointment of second counsel was needed to compensate for them.

On appeal, appellant still has failed to identify any specific factual details that made appointment of second counsel necessary. (AOB 82-100.) Instead, appellant faults the trial court for stating in its order denying the application that "[t]here is nothing presented to this Court that would indicate that the agreement between defendant and counsel was for anything less than full representation of the defendant during all proceedings." (12 CT 3029.) The fact that trial counsel was retained was a relevant fact for the trial court to consider. Had appellant's agreement with trial counsel been for less than full representation, then appellant's lack of ability to pay for counsel would make him eligible for appointment of counsel at the public's expense. Instead, trial counsel was retained for the entire representation of appellant in this case. Consequently, there was no need to consider whether second counsel should be appointed to perform representation for which trial counsel was retained.

Because the application for second counsel failed to "set[] forth in detail the reasons why a second attorney should be appointed" (Pen. Code, § 987, subd. (d)), and instead, was an "abstract assertion" that second counsel was needed (*People v. Staten*, *supra*, 24 Cal.4th at p. 447), the trial court acted well within its discretion in denying the request because "[t]here appear to be neither specific facts nor complexity of issues that require such appointment." (12 CT 3029.) This claim fails.

II.

THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S PROFFERED EVIDENCE REGARDING DETECTIVES TEAGUE AND MARKEL TO EXPLAIN WHY APPELLANT FABRICATED DEFENSE EVIDENCE

In appellant's second claim, he argues that the trial court erred in excluding evidence that Detectives Teague and Markel had been investigated for fabricating evidence in an unrelated criminal matter. Appellant asserts that

this evidence should have been admitted to substantiate why he had the eyeglasses (Def. Exh. B) made and falsely presented at trial as the eyeglasses that he wore to the party on the night of the murders. (AOB 100-108.) Appellant claims that the trial court's error denied him the right to due process and a fair trial, the right to present a defense, the right to a reliable determination of guilt and penalty, the right to confront and cross-examine witnesses, and the right to fundamental fairness as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution, and article I, sections 7, 15, 16, 17, and 28 of the California Constitution. (*Ibid.*) This claim is meritless.

A. Relevant Proceedings At Trial

On August 22, 1996, the prosecutor inquired of appellant's trial counsel whether he intended to cross-examine Detectives Teague and Markel regarding an investigation into allegations that they fabricated evidence in an unrelated criminal case. The prosecutor informed the trial court, and appellant's trial counsel conceded, that the officers were exonerated as to the allegations. Appellant's trial counsel apparently had not yet decided whether it was an appropriate area of inquiry. (2 RT 384-394.) The trial court subsequently ordered that there was to be not mention of investigation into allegations that Detectives Teague and Markel committed misconduct. (9 CT 2372-2373.) Appellant's trial attorney agreed to the order. (14 RT 2514-2515.)

During the defense case, a hearing was conducted outside the presence of the jury regarding the evidence of the investigation regarding Detectives Teague and Markel. Appellant's trial attorney informed the trial court that appellant wanted to testify in response to what he claimed were false statements by Donna Tucker and Detective Teague, that he had the eyeglasses (Def. Exh.

B) made and that Detective Teague was trying to "frame" him.[40] Appellant's trial attorney wanted to introduce evidence that Detectives Teague and Markel had been investigated regarding claims of fabricating evidence, even though they had been exonerated, to corroborate appellant's state of mind for why he had the eyeglasses made. The prosecutor objected to the admission of the evidence under Evidence Code section 352. The trial court ordered that appellant could testify that he had the eyeglasses made in response to his belief that Donna and Detective Teague were lying. The trial court observed that evidence of the detectives being investigated did not appear probative as to appellant's state of mind because the reasonable response to hearing of the investigation would be to wait and hope for a finding of police misconduct rather than immediately arrange to personally fabricate evidence. The trial court excluded the evidence regarding the investigation pursuant to Evidence Code section 352. (24 RT 4515-4531.)

B. Relevant Legal Principles

Evidence Code section 352 provides that a trial court has discretion to exclude evidence when the probative value of the evidence is substantially outweighed by the probability that admission of the evidence will "necessitate undue consumption of time," or "create substantial danger of undue prejudice," "confusion of the issues,"or "misleading the jury." Exclusion of evidence pursuant to Evidence Code 352 is reviewed for abuse of discretion. (*People v. Cornwell* (2005) 37 Cal.4th 50, 81; *People v. Holloway* (2004) 33 Cal.4th 96, 134.) A criminal defendant has a constitutional right to present a defense.

---

40. Appellant's father Sal and appellant's brother Paul testified that the eyeglasses (Def. Exh. B) had been inside Sal's home since the time of appellant's arrest. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 20 RT 3842-3848; 21 RT 3870-3872, 3876-3877.)

(*Washington v. Texas* (1967) 388 U.S. 14, 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *People v. Cornwell, supra*, 37 Cal.4th at p. 82.) However, application of ordinary state rules of evidence, including application of Evidence Code section 352, generally does not deprive a criminal defendant the right to present a defense. (*People v. Cornwell, supra*, 37 Cal.4th at p. 82; *People v. Lawley* (2002) 27 Cal.4th 102, 154-155.)

C. The Probative Value Of The Evidence Regarding Detectives Teague And Markel Being Investigated For Fabrication Of Evidence Was Substantially Outweighed By The Danger Of Undue Prejudice

The trial court properly excluded the evidence regarding the investigation. Appellant explained that he panicked and had the eyeglasses made (Def. Exh. B) because he believed Donna Tucker and Detective Teague were trying to frame him. (24 RT 4567-4569.) The trial court aptly identified that learning Detectives Teague and Markel were the subject of an investigation had little probative value. A reasonable response to learning of such allegations would not include a defendant immediately having false evidence created and presented at trial. Moreover, presentation of the evidence that Detectives Teague and Markel were investigated would also have brought out the fact that they were exonerated, further showing the unreasonableness of appellant's panic and response. The danger of undue prejudice was strong in that the prosecution would have to consume undue amounts of time presenting evidence explaining what the allegations of misconduct were in the unrelated case and in explaining that the detectives were exonerated. Given that the trial court has wide latitude in determining whether evidence should be excluded pursuant to Evidence Code 352, and because appellant was able to testify to the main thrust of his explanation for why he had the eyeglasses made, no abuse of discretion occurred.

D. Even If Error Occurred, Any Error Was Harmless

Application of ordinary rules of evidence such as Evidence Code 352 does not implicate the federal Constitution. Consequently, any error in the application of section 352 will be reviewed for prejudice under the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125.) Reversal is not warranted in this case unless it is reasonably probable that appellant would have received a more favorable result absent the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

It is not reasonably probable that appellant would have received a more favorable result had he been allowed to testify that his panic in getting the eyeglasses made was also in response to learning that Detectives Teague and Markel were being investigated regarding misconduct in an unrelated case. As mentioned earlier, the jury also would have heard evidence that the detectives were exonerated from any wrongdoing, which would have bolstered their credibility regarding their investigation of appellant's guilt.

Moreover, the evidence of appellant's identity as the murderer and his motive for killing the victims was overwhelming. After Mike Arevalo was hit with the bottle and severely injured, appellant was still at the party and had a shotgun concealed in his car. The shotgun had pump action and a pistol grip. (10 RT 1899-1900; 11 RT 1946, 1948-1949, 1976, 2009-2014; 17 RT 3188; 21 RT 4022-4023.) Appellant told Ray Muro that he was going to retaliate against the person who attacked Arevalo. (10 RT 1899, 1902; 11 RT 1977.) When the two victims left the party, they were followed by a car matching the description of the car appellant drove to the party. (9 RT 1492-1498, 1536.)

Two firefighters, Alex Quintana and Donald Jones, heard the shotgun blasts that killed the victims, and they heard Yolanda pleading for appellant to not shoot her. They saw the shooter return to a car that matched the description

of the car appellant drove to the party. Quintana heard sounds consistent with the shotgun having a pump action. (12 RT 2062-2072, 2086, 2089-2092, 2110-2111, 2114, 2123-2132, 2136, 2139-2142, 2072-2073, 2119, 2145-2146, 2176-2177, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319.) Jones viewed a videotape of the party and identified appellant as the shooter. (10 RT 1895; 12 RT 2148-2154, 2186-2188.) At the scene of the shooting, Jones found appellant's eyeglasses that he wore to the party. Nobody touched the eyeglasses until the police arrived at the scene. Jones pointed them out to one of the police officers. (12 RT 2135, 2146-2147, 2183; 14 RT 2631-2632, 2638, 2670-2671.) Appellant met Mike Arevalo later in the evening, after the time of the shooting, and informed him that the "situation had been handled." (9 RT 1658-1661, 1697-1698; 10 RT 1736-1737, 1907-1910; 11 RT 1983-1985, 1193-1194, 2020.)

There was substantial evidence of appellant attempting to avoid apprehension. Following the murders, appellant, Paul, and Sal had appellant's car repainted a different color than it was on the night of the party, and had some body damage repaired. The car was left at the body shop and not picked up by appellant or his family. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910; 20 RT 3707; 30 RT 3791.) During the police investigation of the murders, Detective Teague contacted appellant and asked to interview him. Appellant falsely told Detective Teague that he was in Las Vegas, and falsely told the detective that he was working for a construction company there. (16 RT 2967, 2970-2975; 21 RT 4007-4011.) Sal, who helped appellant avoid being captured by the police, threatened Donna Tucker about assisting the police. (21 RT 4028-4029, 4033; 22 RT 4112.)

Appellant made several admissions that he committed the murders. When Donna Tucker confronted appellant with a newspaper article describing the murders and asked whether he committed them, appellant confessed that he

committed the crimes. Appellant told Donna that he killed Yolanda because she saw him kill Richard. Appellant said that he "got a rush off of that, that it felt really good." He smiled as he said that he got a "rush off of" killing the girl. Appellant seemed excited. (21 RT 4019-4020.) At Sal's home, appellant again confessed to Donna that he committed the murders and he was not sorry for having committed the murders. Appellant admitted that the firemen saw him commit the murders, his fingerprints were on the shotgun shells found by the police, and the authorities had the eyeglasses he wore that night. (21 RT 4036.) Appellant also wrote a letter to his sister Pauline in which he admitted committing the murders and further admitted that his fingerprints were on the shotgun shells found by the police and that the police had the eyeglasses that he wore that night. (21 RT 4043-4044; 22 RT 4115-4119; 27 RT 5057-5066.) When appellant was arrested, he had an unmailed letter in his pocket written to Pauline. In that letter, he told Pauline to destroy everything. (27 RT 5067.)

With Sal's assistance, appellant attempted to avoid apprehension by fleeing the Los Angeles area following the crimes. He spent several weeks moving in various areas including West Covina, Oceanside, San Diego, San Bernardino, Arizona, and Mexico. When he finally returned to Los Angeles, he was discovered in a hidden compartment in a closet in Sal's home. He went to the hidden compartment because he saw that police officers were outside the house. (17 RT 3164-3169, 3170-3172; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Moreover, appellant directly sabotaged his own credibility by introducing into evidence the eyeglasses that were falsely purported by his brother Paul and his father Sal to be those that appellant wore at the party and had been left on the refrigerator in his house for the two years following his arrest. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.)

Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had appellant been allowed to testify that his producing the evidence of the eyeglasses (Def. Exh. B) was partially influenced by learning that Detectives Teague and Markel were being investigated, and subsequently exonerated, for allegations of misconduct. This claim fails.

III.

THE PROSECUTION COMPLIED WITH ITS DUTIES TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE PURSUANT TO *BRADY v. MARYLAND* AND COMPLIED WITH ITS DUTIES REGARDING DISCOVERY PURSUANT TO PENAL CODE SECTION 1054.1

In his third claim, appellant contends that the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] by failing to disclose several items of material exculpatory evidence and also failed in several respects to comply with its duties regarding discovery pursuant to Penal Code section 1054.1. Appellant contends that the violations denied him the right to due process, a fair trial, counsel, presentation of a defense, confrontation and cross-examination of witnesses, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, sections 15, 16, and 17 of the California Constitution, as well as his rights pursuant to Penal Code section 1054.1. (AOB 108-125.) This claim fails because the record shows that the prosecution complied with its duties pursuant to *Brady* and Penal Code section 1054.1.

A. Relevant Legal Principles

In *In re Brown* (1998) 17 Cal.4th 873, this Court summarized the prosecution's duty to provide discovery to the defendant:

> "Pursuant to *Brady, supra,* 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request, a general request, or none at all. The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf. Courts have thus consistently decline[d] to draw a distinction between different agencies under the same government, focusing instead upon the prosecution team which includes both investigative and prosecutorial personnel."

(*In re Brown*, *supra*, 17 Cal.4th at p. 879, quotations and citations omitted; *Kyles v. Whitley* (1995) 514 U.S. 419, 437 [115 S.Ct. 1555, 131 L.Ed.2d 490]; *United States v. Agurs* (1976) 427 U.S. 97, 107 [96 S.Ct. 2392, 49 L.Ed.2d 342]; *Brady v. Maryland*, *supra*, 373 U.S. at p. 87.) In addition, this Court observed as follows:

> "As a concomitant of this duty, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation. The Supreme Court recently reiterated this principle: whether the prosecutor succeeds or fails in meeting this obligation [to learn of favorable evidence] (whether, that is, a failure to disclose is in good faith or bad faith, [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."

(*In re Brown, supra,* 17 Cal.4th at pp. 879-880, citations and quotations omitted; *Kyles v. Whitley*, *supra*, 514 U.S. at pp. 437-438; *Giglio v. United States* (1972) 405 U.S. 150, 154 [92 S.Ct. 763, 31 104].)

Under *Brady,* evidence is "'favorable'" if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. (*In re Sassounian* (1994) 9 Cal.4th 535, 544, quoting *United States v. Bagley* (1985) 473 U.S. 667, 676, 682 [105 S.Ct. 3375, 87 L.Ed.2d 481].) Evidence is "'material'" only if "'there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.'" (*In re Sassounian, supra*, 9 Cal.4th at p. 544, quoting *United States v. Bagley, supra*, 473 U.S. at p. 682, citations omitted.) The "'reasonable probability'" must be a probability sufficient to "'undermine[ ] confidence in the outcome'" on the part of the reviewing court. (*In re Sassounian*, *supra*, 9 Cal.4th at p. 544, quoting *United States v. Bagley*, *supra*, 473 U.S. at p. 678.)

Penal Code section 1054.1 is part of California's reciprocal criminal discovery statutes enacted in 1990 by the adoption of Proposition 115. (See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 363-364.) The constitutional duty to disclose pursuant to *Brady* is independent of, and to be differentiated from, the statutory duty of the prosecution to disclose information to the defense. (Penal Code, §§ 1054 et seq.; *Izazaga v. Superior Court*, 54 Cal.3d at p. 378.) Section 1054.1 provides as follows:

> "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> (b) Statements of all defendants.
>
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> (e) Any exculpatory evidence.
>
> (f) Relevant written or recorded statements of witnesses or reports of

> the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

During trial, the trial court may make "any order necessary" to enforce the statutory discovery scheme, including "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subdivision (b); see also *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203 [upholding exclusion of testimony as sanction for nondisclosure].) Also, the trial court may advise the jury of any failure to disclose. (§ 1054.5) But, because a continuance is an obvious potential remedy for a late disclosure, a defendant on appeal is required to show that the prosecution's violation could not have been cured by a continuance. (*People v. Carpenter* (1997) 15 Cal.4th 312, 386.)

Trial court rulings regarding discovery matters are generally are reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Should a defendant be able to demonstrate error on appeal, the remedies available for violation of the discovery rules are governed by article VI, section 13 of the California Constitution, which provides in part that:

> [n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence . . . or for any error as to any matter of procedure, unless, after examination of the entire cause, including the evidence, the [reviewing] court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

This Court has repeatedly reaffirmed the general proposition that "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party

would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 210 [following *Watson*].) California courts have required this showing of prejudice in claims of discovery violations on appeal. (E.g. *People v. Pinholster* (1992) 1 Cal.4th 865, 941 ["any failure to timely disclose the witness was harmless and did not undermine the reliability of the proceedings"]; *People v. Bell* (1998) 61 Cal.App.4th 282, 291 [applying *Watson* test to alleged discovery violation].

B. The Prosecutor's Notes Regarding Ray Muro

Appellant argues that a discovery violation and a *Brady* violation occurred because the prosecution did not disclose written notes regarding a statement Ray Muro gave to the police about an admission by appellant. (AOB 109-110, 119.) The prosecution presented evidence that after the murders, appellant went to the home of Mike Arevalo's father in Alhambra. When Arevalo returned to his father's home after being treated for his injuries from being hit with the bottle, he talked briefly with appellant outside the home. Without objection from the defense, Ray Muro testified that while appellant and Arevalo were talking, appellant told Arevalo the "situation had been handled" and then they embraced. (10 RT 1909-1910; 11 RT 1993-1994.)

Outside the presence of the jury, appellant's trial attorney informed the trial court that Ray Muro was interviewed by Detective Teague on January 12, 1996. Muro did not tell Detective Teague during the interview that appellant made the "situation had been handled" statement to Mike Arevalo. On February 3, 1997, Muro met with Detective Teague and the prosecutor. During the February 3 meeting, Muro said that appellant had made the "situation had been handled" statement to Arevalo. The prosecutor took notes regarding the February 3 meeting. Appellant's trial attorney, however, claimed that he had not been given a copy of those notes. (10 RT 1927-1929.) The prosecutor

informed the trial court that he had made notes of the February 3 meeting with Ray Muro, but that he had told appellant's trial attorney about the "situation had been handled" statement. (10 RT 1929-1930.)

The trial court resolved the factual dispute by finding that the prosecutor had told appellant's trial counsel about the statement. The trial court also concluded that no violation of discovery rules occurred, but agreed to give appellant's trial attorney additional time to prepare for cross-examination of Ray Muro. (10 RT 1930-1932.)

During cross-examination, appellant's trial counsel asked Ray Muro why he did not tell the police about the "situation had been handled" statement at their first meeting. Muro explained that he did not mention the statement during the first police meeting because he "just did not want to get involved." (10 RT 1994.) Muro told the police about the statement at the second meeting because his conscience was bothering him. (10 RT 1994-1995.)

Appellant apparently concedes that no *Brady* violation occurred due to any failure to disclose the notes of Ray Muro's statement to the police. He asserts that the testimony of Muro about the "situation had been handled" statement was "exceedingly damaging to appellant's case." (AOB 119.) Consequently, appellant apparently concedes that the information was not material exculpatory information within the meaning of *Brady*. (*United States v. Bagley*, *supra*, 473 U.S. at pp. 676, 678; *In re Sassounian*, *supra*, 9 Cal.4th at p. 544.)

The trial court also correctly found that no discovery violation occurred with respect to the written notes regarding Ray Muro's statement to the police. The trial court specifically resolved the factual dispute by finding that the prosecutor orally disclosed to appellant's trial attorney the content of Muro's statement. (10 RT 1930-1932.)

Even if a discovery violation occurred, any error was harmless. First, the

trial court agreed to provide appellant additional time to prepare for the cross-examination of Muro. Appellant has failed to identify how any error by the prosecution could not have been cured by a continuance. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 386.) Moreover, it is not reasonably probable that appellant would have obtained a more favorable outcome had the trial court excluded the "situation had been handled" statement. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant made several other admissions that he committed the murders. When Donna Tucker confronted appellant with a newspaper article describing the murders and asked whether he committed them, appellant confessed that he committed the crimes. Appellant told Donna that he killed Yolanda because she saw him kill Richard. Appellant said that he "got a rush off of that, that it felt really good." He smiled as he said that he got a "rush off of" killing the girl. Appellant seemed excited. (21 RT 4019-4020.) At Sal's home, appellant again confessed to Donna that he committed the murders and he was not sorry for having committed the murders. Appellant admitted that the firemen saw him commit the murders, his fingerprints were on the shotgun shells found by the police, and the authorities had the eyeglasses he wore that night. (21 RT 4036.) Appellant also wrote a letter to his sister Pauline in which he admitted committing the murders and further admitted that his fingerprints were on the shotgun shells found by the police and that the police had the eyeglasses that he wore that night. (21 RT 4043-4044; 22 RT 4115-4119; 27 RT 5057-5066.) When appellant was arrested, he had an unmailed letter in his pocket written to Pauline. In that letter, he told Pauline to destroy everything. (27 RT 5067.)

As set forth more fully in Section II.D, there was substantial evidence establishing appellant's identity as the murderer and his motive for killing the

victims. (9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.)

There was substantial evidence of appellant attempting to avoid apprehension. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112.) With Sal's assistance, appellant attempted to avoid apprehension by fleeing the Los Angeles area following the crimes. He spent several weeks moving in various areas including West Covina, Oceanside, San Diego, San Bernardino, Arizona, and Mexico. When he finally returned to Los Angeles, he was discovered in a hidden compartment in a closet in Sal's home. He went to the hidden compartment because he saw that police officers were outside the house. (17 RT 3164-3169, 3170-3172; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Appellant undermined his own credibility by introducing into evidence the eyeglasses that were falsely purported by his brother Paul and his father Sal to be those that appellant wore at the party and had been left on the refrigerator in his house for the two years following his arrest. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.) Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had

the "situation had been handled" statement been excluded.[41] This claim fails.

C. Detective Scott Walton's Opinion Regarding White Markings On Richard Rodriguez's Car

Next, appellant argues that the prosecution violated discovery rules and *Brady* by not disclosing Detective Walton's opinion regarding the substance of the white markings on Richard Rodriguez's car. (AOB 110-111, 120-121.) Detective Walton was called as a prosecution witness outside the presence of the jury. He had not spoken with the prosecution prior to appearing in court to testify in appellant's case. (13 RT 2444.) During his investigation of appellant's case, he had been asked to look at automobile molding pieces and provide an opinion whether they matched the molding pieces that should have been on Richard Rodriguez's car. (13 RT 2444-2445.) He also was asked to look at appellant's Honda CRX. He took measurements from both vehicles. He wrote a report and provided it to the prosecution. The report, however, did not mention anything about white markings on Richard Rodriguez's car. (13 RT 2445.) Detective Walton had not told anyone of his opinion regarding the markings on Richard Rodriguez's car prior to appearing at court to testify in appellant's case. (13 RT 2445-2446.)

In looking at the two vehicles, Detective Walton noticed markings on Richard Rodriguez's car and drew conclusions about what substance the markings consisted of. He mentioned to Detective Markel that there was paint transfer on Richard Rodriguez's car. However, Detective Markel told him to not "worry about any paint transfer" and instead to "look at the damage."

---

41. For the same reasons, even if the statement is found to be exculpatory within the meaning of *Brady*, the statement is not considered material within the meaning of *Brady* because it is not reasonable probability that, had the information been disclosed to the defense, the result would have been different. (*United States v. Bagley*, *supra*, 473 U.S. at p. 682; *In re Sassounian*, *supra*, 9 Cal.4th at p. 544.)

Detective Markel was "not interested" in the paint transfer because the CRX had been painted sometime after the collision. Detective Walton did not make any notation in his report about the paint transfer. (13 RT 2449-2454, 2456-2457, 2463-2464.)

While Detective Walton was waiting at the courthouse on the scheduled date for his testimony, appellant's trial attorney asked Detective Walton about some paint transfer on Richard Rodriguez's car. Trial counsel said that the paint transfer looked white and opined that it would seem that the paint transfer came from a white car. (13 RT 2446.) Detective Walton told appellant's trial attorney that while it was possible for the paint transfer to have come from a white car, it "could have come from any color car or it could have just been the wax or lacquer transfer from the outer coating, protective coating, or a vehicle or any number of colors which may have changed color due to heat and friction of the vehicles rubbing together during the traffic collision." (13 RT 2446-2447.)

Detective Walton opined that the markings were a "striation" or mark that was "whitish in color." (13 RT 2455-2456.) He explained that he was not an expert regarding paint and could not offer an expert opinion whether the striation was paint. (13 RT 2456-2457.)

The trial court found that no discovery violation occurred because Detective Walton would not be allowed to testify whether the markings were paint. The opinion that Detective Walton had given appellant's trial attorney was beyond his experience. Consequently, there is no testimony that the "paint transfer" was actually paint, wax, or some other substance. Any such expert testimony would have to come from someone other than Detective Walton. No discovery violation occurred with respect to Detective Walton's observations. (13 RT 2464-2467.)

As the record shows, no discovery violation occurred. Detective Walton

expressly told the trial court that he was not an expert with respect to paint. Consequently, his statement was not that of an "expert made in conjunction with the case." (Pen. Code, § 1054.1, subd. (f).) Because Detective Walton did not conduct any examination of the marks, there were no "results of examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." (*Ibid.*)

Moreover, Detective Walton's statements to appellant's trial attorney were not exculpatory within the meaning of *Brady* because they were not helpful to the defense and did not hurt the prosecution's case. (*United States v. Bagley*, *supra*, 473 U.S. at pp. 676, 678; *In re Sassounian*, *supra*, 9 Cal.4th at p. 544.) First, the statements had no relevance at all as expert opinion because Detective Walton expressly told the trial court that he was not an expert with respect to paint. Second, Detective Walton said that the markings could have come from a white car, but they also could have come from a car of any color. The marks also could have been wax or some substance other than paint. Consequently, Detective Walton's opinion did not bolster the defense theory that appellant's CRX could not have been the car that collided with Richard Rodriguez's car.

Even if a discovery violation occurred, any error was harmless. Appellant has again failed to identify how any error by the prosecution could not have been cured by a continuance. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 386.) Also, it is not reasonably probable that appellant would have obtained a more favorable outcome had Detective Walton's statement been disclosed earlier. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Similarly, the information is not "material" within the meaning of *Brady* because it is not reasonable probability that, had the information been disclosed to the defense, the result would have been different. (*United States v. Bagley*, *supra*, 473 U.S. at p. 682;

In re Sassounian, *supra*, 9 Cal.4th at p. 544.)

First, Detective Walton's statement is not helpful to the defense because he opined that the white marks could have come from any color car. (13 RT 2446-2447.) Even if Detective Walton's statement had some benefit to the defense, there was still overwhelming prosecution evidence establishing appellant's identity as the murderer and his motive for killing the victims. (See Section II.D, *supra*; 9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.)

Appellant also made several admissions that he committed the murders. (21 RT 4019-4020, 4036, 4043-4044; 22 RT 4115-4119; 27 RT 5057-5067.) There was substantial evidence of appellant's attempts to flee and avoid apprehension. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 17 RT 3164-3169, 3170-3172; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Appellant destroyed his own credibility by falsifying the eyeglasses evidence. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.) Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had

Detective Walton's statements been disclosed earlier. Consequently, any discovery violation was harmless and if the evidence were somehow exculpatory within the meaning of *Brady*, it was not material. This claim fails.

D. Detective Teague's Opinion Regarding The Direction The Shooter Was Facing When The Fatal Shots Were Fired

Appellant's third claim is that the prosecution violated discovery rules and committed *Brady* error by failing to disclose Detective Teague's opinion that the shooter faced the fire station[42] when the fatal shots were fired. (AOB 111, 121.) Detective Teague testified on cross-examination by the defense that the shooter was facing the fire station when the two victims were killed. (15 RT 2753-2757.) Although Detective Teague informed the prosecution of this opinion in December of 1994, he did not write the opinion in any report. (15 RT 2771.)

Outside the presence of the jury, appellant's trial counsel argued that the prosecution's failure to disclose the oral opinion violated Penal Code section 1054.1, subdivision (f). (15 RT 2775-2791.) Appellant's trial counsel conceded that Detective Teague's opinion regarding the direction the shooter faced was not exculpatory within the meaning of *Brady*. (15 RT 2788.)

No discovery violation occurred with respect to Detective Teague's opinion regarding the shooter facing the fire station. Penal Code section 1054.1, subdivision (f) requires the prosecution to disclose only "written or recorded" statements of witnesses. It is undisputed that Detective Teague's

---

42. The murders occurred near Los Angeles City Fire Department Station 47 in El Sereno. Alex Quintana, an engineer for the Los Angeles City Fire Department, and Donald Jones, a firefighter, were in the fire station at the time of the murders and witnessed various aspects of the murders. (12 RT 2062-2072, 2086, 2089-2090, 2092, 2099, 2110-2111, 2114, 2123-2132, 2136, 2139-2140, 2142, 2176-2177, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319.)

opinion was not written or included in any report. (15 RT 2771.)

In *In re Littlefield* (1993) 5 Cal.4th 122, this Court held that a party to a criminal prosecution may not avoid the disclosure requirements of the criminal discovery statutes by refraining to obtain readily available information. (*Id.* at pp. 133-136.) The California Court of Appeal for the Third Appellate District held that under Penal Code section 1054.1, subdivision (b), unrecorded oral statements must also be disclosed, so as to prevent "gamesmanship" by the parties. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165-167.) This Court, however, has not yet decided whether unrecorded oral statements must also be disclosed under Penal Code section 1054.1, subdivision (f). Moreover, the record shows that the prosecution did not engage in any "gamesmanship" with respect to Detective Teague's opinion that the shooter faced the fire station. During the two-year period that appellant's trial attorney had worked on the case, he spoke with Detective Teague numerous times, without any interference from the prosecution. Appellant's trial attorney, however, did not ask Detective Teague regarding his opinion based on his interpretation of the crime scene photographs or Detective Teague's recollection of the crime scene until the cross-examination at trial. (15 RT 2722-2773.)[43]

Even if a discovery violation occurred, any error was harmless. Appellant has again failed to identify how any error by the prosecution could not have been cured by a continuance. (*People v. Carpenter, supra*, 15 Cal.4th at p. 386.) Appellant merely contends that had Detective Teague's opinion about the shooter facing the fire station been disclosed earlier, appellant could have obtained an expert to "effectively counter or deal with Teague's damaging

---

43. Additionally, it is clear that no *Brady* violation occurred as Detective Teague's opinion that the shooter was facing the fire station was not exculpatory.

conclusion." (AOB 121.) Appellant, however, has failed to explain whether any expert would have provided an opinion contrary to that given by Detective Teague.

Also, it is not reasonably probable that appellant would have obtained a more favorable outcome had Detective Walton's statement been disclosed earlier. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Similarly, the information is not "material" within the meaning of *Brady* because it is not reasonable probability that, had the information been disclosed to the defense, the result would have been different. (*United States v. Bagley*, *supra*, 473 U.S. at p. 682; *In re Sassounian*, *supra*, 9 Cal.4th at p. 544.)

Excluding Detective Teague's opinion regarding the direction the shooter faced would have resulted in no change in the result of trial. Excluding Detective Teague's opinion would not have undermined the overwhelming evidence of appellant's identity as the murderer and his motive for killing the victims. (See Section II.D, *supra*; 9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.) Specifically, excluding Detective Teague's opinion would not have undermined the evidence that Firefighter Donald Jones identified appellant as the shooter after viewing a videotape of the party. (10 RT 1895; 12 RT 2148-2154, 2186-2188.) Appellant offered no expert testimony that the shooter was facing in any direction other than the fire station at the time he murdered the two victims.

Excluding Detective Teague's opinion would not have cast any doubt

on the prosecution evidence that appellant also made several admissions that he committed the murders (21 RT 4019-4020, 4036, 4043-4044; 22 RT 4115-4119; 27 RT 5057-5067), and appellant's considerable efforts to avoid apprehension (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 17 RT 3164-3169, 3170-3172; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967).

As mentioned earlier, appellant also undermined his own credibility by falsifying the eyeglasses evidence (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303), and by admitting that he lied to the police and lied during his testimony (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045).

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result had Detective Teague's opinion been disclosed earlier. Consequently, any discovery violation was harmless and if the evidence were somehow exculpatory within the meaning of *Brady*, it was not material. This claim fails.

E. Measurements Taken Of Paul Escoto's Car

Appellant's fourth claim is that the prosecution committed a discovery violation and *Brady* error in failing to disclose evidence regarding various measurements regarding Paul Escoto's car. (AOB 111-112, 123.) One of appellant's theories of the case was that Escoto was one of the killers and that his car could have caused the collision with Richard Rodriguez's car. Additionally, Escoto's car bore some resemblance to the shooter's car identified by the firefighters at the fire station. (AOB 123; 15 RT 2769-2770, 2815-2822; 16 RT 3030; 17 RT 3133-3138.)

Detective Teague believed that skid marks found at the scene of the murders were from the shooter's car and were acceleration marks from a front-

wheel drive vehicle. (15 RT 2797-2803.) The acceleration marks at the murder scene showed that the wheel base of the car making those marks would measure 4 feet 9 inches. Detective Markel measured the wheel base of the front wheels on appellant's car and found it to be 4 feet 9 inches. (17 RT 3190-3191, 3193.)

On the day following cross-examination from the defense regarding the similarities between Paul Escoto's car and witness statements about the car seen at the murder scene, Detective Teague conducted an additional examination of Escoto's car. He found Escoto's car to be a rear-wheel drive car. He also measured the wheel base of the rear wheels on Escoto's car and found it to be 4 feet 6 inches. (17 RT 3140-3142.) On the second day of trial following Detective Teague's additional examination of Escoto's car, the prosecutor gave appellant's trial attorney a written copy of the information obtained by Detective Teague. (17 RT 3147-3150.) Detective Teague testified that he did not conduct this examination of Escoto's car earlier because the color of Escoto's car did not match the witness descriptions of the shooter's car. (17 RT 3150-3153.) The trial court found that no discovery violation occurred, but gave appellant's trial attorney additional time to gather information to refute Detective Teague's testimony. (17 RT 3149-3150.)

No *Brady* violation occurred. Because the additional information Detective Teague obtained regarding Paul Escoto's car during the trial refuted the defense theory that Escoto's car was used by the shooter, the information is not exculpatory. Additionally, no discovery violation occurred. The prosecution provided appellant's trial attorney with a written copy of the information once it was obtained by Detective Teague during the trial.

Even if a discovery violation occurred, any error was harmless. Appellant has again failed to identify how any error by the prosecution could not have been cured by a continuance. (*People v. Carpenter, supra*, 15 Cal.4th at p. 386.) Appellant merely contends that had the evidence been disclosed,

defense counsel "would have been prepared to meet the evidence." (AOB 123.) Appellant failed to explain what trial counsel could have done to "meet" the additional information that Detective Teague obtained regarding Escoto's car.

Also, it is not reasonably probable that appellant would have obtained a more favorable outcome had the information about Paul Escoto's car been disclosed earlier. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Similarly, even if the information were somehow considered exculpatory under *Brady*, the information is not "material" because it is not reasonable probability that, had the information been disclosed to the defense, the result would have been different. (*United States v. Bagley*, *supra*, 473 U.S. at p. 682; *In re Sassounian*, *supra*, 9 Cal.4th at p. 544.)

Excluding the information about Paul Escoto's car would have resulted in no change in the result of trial. Excluding the information would not have undermined the overwhelming evidence of appellant's identity as the murderer and his motive for killing the victims. (See Section II.D, *supra*; 9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.) Specifically, excluding the information would not have undermined the evidence that Firefighter Donald Jones identified appellant as the shooter after viewing a videotape of the party. (10 RT 1895; 12 RT 2148-2154, 2186-2188.)

Excluding the information about Paul Escoto's car would not have cast any doubt on the prosecution evidence that appellant also made several

admissions that he committed the murders (21 RT 4019-4020, 4036, 4043-4044; 22 RT 4115-4119; 27 RT 5057-5067), and appellant's considerable efforts to avoid apprehension (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 17 RT 3164-3169, 3170-3172; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967).

As mentioned earlier, appellant also undermined his own credibility by falsifying the eyeglasses evidence (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303), and by admitting that he lied to the police and lied during his testimony (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045).

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had the information Detective Teague gathered about Paul Escoto's car would have been disclosed earlier. Consequently, any discovery violation was harmless and if the evidence were somehow exculpatory within the meaning of *Brady*, it was not material. This claim fails.

F. Investigation Notes Regarding J.P. Hernandez

Appellant's fifth claim is that the prosecution committed *Brady* error and committed a discovery violation by failing to disclose investigation notes regarding J.P. Hernandez which included Mr. Hernandez's phone number, that he made a statement regarding his opinion of licensed professionals, and that he had been previously arrested for felony DUI and assault on a police officer. (AOB 112, 119-120.) Evidence at trial showed that the police believed appellant to be hiding at the residence of Mr. Hernandez, a friend of appellant, in San Gabriel. When the police went to Mr. Hernandez's home, appellant was not there. Mr. Hernandez had told the police that appellant had been at his residence an hour earlier, but he did not see appellant again after he left. (16

RT 2998-3000, 3004; 17 RT 3201-3222.)

Mr. Hernandez testified that he was interviewed by the prosecutor, Detective Teague, and several others at the prosecutor's office. He said that the prosecutor took notes during the interview. (17 RT 3213-3214, 3217-3219, 3223-3225.) The prosecutor told the court that he was "writing things down" during the interview but that the notes were "not anything about this case" or about Mr. Hernandez. Detective Teague and the others in the interview did not take any notes. (17 RT 3224.)

The next day, the prosecutor informed the court that he had some information regarding Mr. Hernandez including his phone number, the name of his employer, and notes that Mr. Hernandez "had made some comment about professionals - licensed professionals, about being liars or something." In addition, the notes indicated that he had been arrested for a felony DUI and an assault on a police officer. (18 RT 3361.) The trial court ordered the prosecutor to give a copy of the notes to appellant's trial attorney. (18 RT 3361-3362.) The trial court found that no discovery violation occurred with respect to the phone number, the name of the employer, and the comment about licensed professionals because the information was not relevant. The trial court offered to have Mr. Hernandez called back to testify. As to the information regarding the arrests, the trial court found that a discovery violation occurred with respect to the arrest information and as a sanction, offered to give appellant's trial attorney a continuance to investigate and call Mr. Hernandez back to testify. (18 RT 3362-3363.) Appellant's trial attorney did not ask for Mr. Hernandez to be called back to court to testify.

It is somewhat unclear whether the notes the prosecutor had established that Mr. Hernandez had a felony conviction rather than an arrest. However, even if the information about Mr. Hernandez was exculpatory, the information does not appear to be material. Likewise, if a discovery violation occurred, any

error is harmless. (*United States v. Bagley*, *supra*, 473 U.S. at p. 682; *People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *In re Sassounian*, *supra*, 9 Cal.4th at p. 544; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

As to the alleged discovery, appellant has not identified how such error could not have been cured by a continuance. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 386.) Also, it is not reasonably probable that appellant would have obtained a more favorable outcome had the information about Mr. Hernandez been disclosed earlier. Mr. Hernandez's testimony only pertained to appellant's whereabouts immediately before his arrest. Even if Mr. Hernandez's testimony been stricken, there was still overwhelming evidence about appellant fleeing to avoid apprehension and his attempts to hide inside the Verdugo home. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 17 RT 3164-3169, 3170-3172; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Excluding Mr. Hernandez's testimony would have resulted in no change in the result of trial. Excluding his testimony would not have undermined the overwhelming evidence of appellant's identity as the murderer and his motive for killing the victims. (See Section II.D, *supra*; 9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.)

Excluding the testimony would not have cast any doubt on the prosecution evidence that appellant also made several admissions that he

committed the murders. (21 RT 4019-4020, 4036, 4043-4044; 22 RT 4115-4119; 27 RT 5057-5067.) As mentioned earlier, appellant also undermined his own credibility by falsifying the eyeglasses evidence (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303), and by admitting that he lied to the police and lied during his testimony (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045).

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had Mr. Hernandez's testimony been excluded. Consequently, any discovery violation was harmless and if the information about Mr. Hernandez was exculpatory within the meaning of *Brady*, it was not material. This claim fails.

G. Detective Walton's Opinions Regarding The Collision Between The Shooter's Car And Richard Rodriguez's Car

Appellant's next claim is that the prosecution violated *Brady* and discovery rules by failing to disclose a report setting forth Detective Walton's opinion regarding the collision between the shooter's car and Richard Rodriguez's car which was based on observations of bumper damage, molding damage, and the angles of the two cars. (AOB 112-113, 121.) Detective Walton testified as an expert regarding accident reconstruction. He inspected various markings and items of damage on appellant's car and Richard Rodriguez's car, and measured various tire markings from the scene of the collision. He opined that appellant's CRX could have collided with Richard Rodriguez's car. (19 RT 3602-3622, 3634-3688.)

Outside the presence of the jury, appellant's trial attorney argued that a discovery violation occurred with respect to Detective Walton's opinion. Although he had received Detective Walton's written report regarding his inspection of the vehicles and the various measurements he took at the scene of

the collision, the report did not refer to bumper damage, molding damage, or the angle of the two cars as a basis for his opinion. The trial court found that a discovery violation occurred, but offered to delay the cross-examination of Detective Walton until appellant could consult with an expert regarding the collision. (19 RT 3622-3634.)

Appellant has conceded that the failure to disclose the full opinion of Detective Walton was not a *Brady* violation because the information "bolstered the prosecution's claim that appellant's CRX was probably the vehicle with which the victim's red car collided." (AOB 121.)

Even if a discovery violation occurred, any error was harmless. Appellant has again failed to identify how any error by the prosecution could not have been cured by a continuance. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 386.) Appellant merely contends that had this information been disclosed, appellant could have consulted an expert who "would have been in a position to effectively cross-examine Walton" about his opinion. (AOB 121.)

Also, it is not reasonably probable that appellant would have obtained a more favorable outcome had Detective Walton's opinion been disclosed earlier. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Excluding the information about Detective Walton's opinion would have resulted in no change in the result of trial. Excluding the information would not have undermined the overwhelming evidence of appellant's identity as the murderer and his motive for killing the victims. (See Section II.D, *supra*; 9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-

2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.)

Excluding Detective Walton's opinion would not have cast any doubt on the prosecution evidence that appellant also made several admissions that he committed the murders (21 RT 4019-4020, 4036, 4043-4044; 22 RT 4115-4119; 27 RT 5057-5067), and appellant's considerable efforts to avoid apprehension (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 17 RT 3164-3169, 3170-3172; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967).

As mentioned earlier, appellant also undermined his own credibility by falsifying the eyeglasses evidence (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303), and by admitting that he lied to the police and lied during his testimony (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045).

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had Detective Walton's opinion been disclosed earlier. Consequently, any discovery violation was harmless. This claim fails.

H. Oral Statement By Donna Tucker That She Was Threatened By The Verdugo Family

Appellant's seventh claim of discovery violation and *Brady* error is that the prosecution failed to disclose an oral statement by Donna Tucker that she was threatened by the Verdugo family. Appellant argues that the oral statement was exculpatory because it affected her credibility. (AOB 113, 122-123.) Donna Tucker's testimony is summarized in Section I.A.9 of the Respondent's Brief.

Appellant's trial counsel cross-examined Detective Teague about a police interview of Donna Tucker that occurred on May 9, 1995. In the written

report concerning the interview, Donna was referred to as a "CRI" or "Confidential Reliable Informant." (16 RT 3032-3034; 17 RT 3126.) Outside the presence of the jury, the prosecutor informed the trial court that he intended to question Detective Teague about Donna having been threatened by the Verdugo family. Appellant's trial counsel objected on grounds that there were no statements referred to in the written report about Donna having been threatened by the Verdugo family. The trial court ruled that no discovery violation occurred because the statements appear to be oral statements of Donna rather than written statements. (17 RT 3127-3129.) Detective Teague subsequently testified that he wanted to keep Donna as a confidential informant because he was concerned for her safety due to her statements to him. (17 RT 3129-3130.)

In pertinent part, Donna Tucker testified that sometime after the police searched her home in December 1994, she went to a meeting with the Verdugo family. Sal Verdugo, appellant's father, was explaining the efforts being made to help appellant avoid being apprehended by the police. At the meeting, Donna told Sal that he was "always telling" her to take care of Michael Verdugo, but how could she do that with what Sal was doing regarding appellant. She also said that there are two dead kids. Sal gave her an extremely angry look. (22 RT 4111-4112.)

On another occasion when Donna Tucker and Michael Verdugo went to Sal's home to meet appellant, Donna accompanied Sal to a restaurant to get some food. Michael went upstairs to talk to appellant. Sal took Donna with him to get some food. While in the car, Sal told Donna, "If you talk to the police - if anyone talks to the police, I can go to the courts, I can find out who said any - whatever - anything that they said. And that they just better watch out. We will keep quiet." Sal appeared to Donna to be very serious when he made this statement. Donna said, "There is [sic] two dead kids." Sal said,

"You're going to keep quiet." He was very forceful when he said it. He also said, "If looks could kill." (21 RT 4028-4033; 22 RT 4112.)

Donna Tucker also testified that on one occasion when she faxed some information to the police, she wanted to hide how the police found out the information because she had been threatened. Donna was afraid. (21 RT 4041-4043.)

In January of 1995, Donna Tucker spoke with Sal by telephone on one occasion. She told Sal to tell appellant to turn himself in. Sal replied that "you're either with us or against us, if you're against us, watch out." Paul said the same thing when Donna spoke with him. (22 RT 4109.)

No discovery violation occurred with respect to Donna Tucker's statements about having been threatened by the Verdugo family. Penal Code section 1054.1, subdivision (f), requires the prosecution to disclose only "written or recorded" statements of witnesses. It is undisputed that Donna's statements were not written or included in any report. (16 RT 3032-3034; 17 RT 3126-3130.)

As mentioned earlier, there appears to be some authority interpreting Penal Code section 1054.1, subdivision (f), as requiring disclosure of unrecorded oral statements to prevent "gamesmanship" by the parties. (*See In re Littlefield, supra*, 5 Cal.4th at pp. 133-136; *Roland v. Superior Court, supra*, 124 Cal.App.4th at pp. 165-167.) The record, however, shows that the prosecution did not engage in any "gamesmanship" with respect to Donna Tucker's oral statements. It was well known that Donna was a confidential informant who had concerns for her safety from appellant. Appellant's trial counsel conceded that during the preliminary hearing, he questioned Donna at length about her being scared of appellant. (17 RT 3129.) Because appellant's trial attorney already had access to information that would impeach Donna due to her fear of appellant, any additional impeachment information regarding the

family would be cumulative. (15 RT 2722-2773.)

Appellant fails to explain how Donna Tucker's statements to the police about the threats from the Verdugo family were exculpatory other than that the threats "may have affected her credibility." (AOB 122-123.) Under *Brady,* the evidence to be disclosed must be "'favorable,'" meaning it must either help the defendant or hurt the prosecution, as by impeaching one of its witnesses. (*In re Sassounian*, *supra*, 9 Cal.4th at p. 544 (quoting *United States v. Bagley*, *supra*, 473 U.S. at pp. 676, 682.) Here, the evidence of threats by the Verdugo family would only bolster Donna Tucker's credibility in that she was testifying against appellant despite what the family may do to her. Such evidence would only favor the prosecution and hurt the defense.[44]

Even if the information is found to be exculpatory, *Brady* error did not occur because the statements were not material, and any discovery violation was harmless. (*United States v. Bagley*, *supra*, 473 U.S. at p. 682; *People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *In re Sassounian*, *supra*, 9 Cal.4th at p. 544; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

As mentioned earlier, the statements about threats by the Verdugo family bolster Donna Tucker's credibility. Apart from his admissions to Donna that he committed the murders, appellant made several admissions. Appellant also wrote a letter to his sister Pauline in which he admitted committing the murders and admitting that his fingerprints were on the shotgun shells found by the police and that the police had the eyeglasses that he wore that night. (21 RT 4043-4044; 22 RT 4115-4119; 27 RT 5057-5066.) When appellant was arrested, he had an unmailed letter in his pocket written to Pauline. In that letter, he told Pauline to destroy everything. (27 RT 5067.)

As set forth more fully in Section II.D, there was substantial evidence

---

44. For the same reasons, the information was not exculpatory within the meaning of Penal Code section 1054.1, subdivision (e).

establishing appellant's identity as the murderer and his motive for killing the victims. (9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.)

There was substantial evidence of appellant attempting to avoid apprehension. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112.) With Sal's assistance, appellant attempted to avoid apprehension by fleeing the Los Angeles area following the crimes. He spent several weeks moving in various areas including West Covina, Oceanside, San Diego, San Bernardino, Arizona, and Mexico. When he finally returned to Los Angeles, he was discovered in a hidden compartment in a closet in Sal's home. He went to the hidden compartment because he saw that police officers were outside the house. (17 RT 3164-3169, 3170-3172; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Appellant undermined his own credibility by introducing into evidence eyeglasses that were falsely purported by his brother Paul and his father Sal to be those that he wore at the party and had been left on the refrigerator in his house for the two years following his arrest. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.) Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had

no error occurred regarding the information about threats by the Verdugo family against Donna Tucker. Consequently, any discovery violation was harmless and to the extent that the information may be considered exculpatory, it was not material under *Brady*. This claim fails.

I. Notes Regarding Donna Tucker's Statement That Appellant Had Previously Worked On Other Vehicles

Appellant's eighth claim of a discovery violation and *Brady* error is that the prosecution failed to disclose Donna Tucker's statement to the police that appellant had previously worked on two automobiles, one of which was a Volkswagen, and that his CRX had louvers on the back windows. (AOB 113-114, 119-120.)

The prosecution evidence was that after the murdering the victims, the shooter drove away in a black Honda that had tinted windows and a louvered back window. (12 RT 2072-2073, 2119, 2145-2146, 2203.) Donna Tucker testified that only appellant drove the CRX. She never saw any repairs being done to the CRX and she never saw appellant or his brother Paul doing any engine work on the CRX. Appellant did engine work, body work, and some electrical work on a Scout. (21 RT 3968-3970.) The CRX had louvers on the rear, hatchback window. (21 RT 3980.) Appellant and his brother Paul worked together on a Volkswagen that could be raced in the dessert. They did body work on the Volkswagen. (21 RT 3973–3974.) Appellant also performed electrical work on a Datsun pickup truck that Donna Tucker owned. (21 RT 39775-3976.)

Appellant's trial counsel objected, arguing that Donna's testimony regarding appellant working on the Scout and the Volkswagen and regarding the CRX having a louvered hatchback window had not been disclosed to the defense. The only written notes the prosecutor had regarding Donna Tucker's testimony as to the automobiles was that the CRX had a louvered hatchback

window. Those notes were given to appellant's trial counsel the morning of Donna's testimony. The trial court found that the prosecution did not have an obligation to disclose the oral statements, and none of Donna's testimony at issue was material exculpatory information within the meaning of *Brady*. The trial court gave appellant's trial attorney an opportunity to request a continuance, if necessary, to investigate how to rebut Donna's testimony. (21 RT 3981-3992.)

The trial court correctly identified that none of Donna Tucker's testimony at issue was material exculpatory information within the meaning of *Brady*. Donna's testimony tended to harm the defense by showing that appellant had the ability to perform work on an automobile to change its appearance. Appellant appears to concede that Donna's testimony was inculpatory because the evidence "would show a consciousness of guilt" by appellant and the failure to disclose the evidence prevented him an opportunity to "amass contrary evidence and to effectively counter" Donna's testimony. (AOB 120.) Consequently, no *Brady* violation occurred.

As mentioned earlier, the prosecution was not obligated to disclose the oral statements of Donna Tucker. (Pen. Code, § 1054.1, subd. (f); *but see In re Littlefield*, *supra*, 5 Cal.4th at pp. 133-136; *Roland v. Superior Court*, *supra*, 124 Cal.App.4th at pp. 165-167.) The prosecutor did not engage in gamesmanship with respect to Donna's oral statements. As the trial court observed, had the information been disclosed several days earlier when it was learned, it did not appear that anything different would have been done by the defense at that time, and that with the exercise of due diligence, Donna's testimony could be tested during the defense case without the need for a continuance. (21 RT 3988, 3991-3992.)

The trial court found that the prosecutor's failure to provide the defense with the notes that Donna Tucker stated the CRX had a louvered hatchback

window was only a "very technical violation." (21 RT 3991-3992.) Appellant has again failed to identify how any error by the prosecution could not have been cured by a continuance. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 386.) Appellant merely contends that had he known about this information he could have subpoenaed the person who actually performed the work on the Volkswagen and could have obtained evidence to "effectively counter" the prosecution's theory that the CRX was the shooter's car. (AOB 120.)

Also, it is not reasonably probable that appellant would have obtained a more favorable outcome had the statement by Donna Tucker been disclosed earlier. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Apart from evidence regarding the CRX, as set forth more fully in Section II.D, there was substantial evidence establishing appellant's identity as the murderer and his motive for killing the victims. (9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.)

There was substantial evidence of appellant attempting to avoid apprehension. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 17 RT 3164-3169, 3170-3172; 20 RT 3707; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967; 30 RT 3791.)

Appellant undermined his own credibility by introducing into evidence eyeglasses that were falsely purported by his brother Paul and his father Sal to be those that he wore at the party and had been left on the refrigerator in his house for the two years following his arrest. (16 RT 2935, 2945, 2979-2980;

18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.) Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had no error occurred regarding Donna Tucker's testimony about appellant's work on the cars. Consequently, any discovery violation was harmless. This claim fails.

J. Information That Donna Tucker Was Given Witness Relocation Funds And Funds To Pay Rent

Appellant's ninth and final claim of a discovery violation and *Brady* error is that the prosecution failed to disclose information that Donna Tucker received witness relocation funds and funds to help pay her rent. (AOB 114-115, 121-122.) During appellant's motion for a new trial, he alleged that the prosecution failed to disclose information that Donna had been relocated.[45] (39 RT 7211-7212.) The prosecutor conceded that Donna had been relocated, but argued that the information about the relocation was not beneficial to the

---

45. In appellant's written motion for a new trial, appellant's trial attorney alleged as follows:

> Lastly, I was told after the trial that the witness, Donna [Tucker] was paid relocation fees. How much? I don't know.
>
> Furthermore, that District Attorney fails to advise as to when she was relocated and on what basis was the relocation provided. (10 CT 2729-2730.)

Appellant's trial attorney stated in a declaration that he was "called after the trial by District Attorney Michael Duarte [the trial prosecutor] and [] was told that Donna [Tucker] was relocated at county expense." (10 CT 2739.) In his response to the prosecution's opposition to the motion for a new trial, appellant argued, "Evidence of the state providing relocation funds for Donna [Tucker] should have been disclosed to the defense. It was reversible error for them not to disclose this information during the trial." (11 CT 2792.)

defense because if the defense brought up the relocation, the prosecution would be allowed to bring up the reasons why it was necessary for Donna to be relocated. (39 RT 7227; 10 CT 2758.) The trial court denied the motion for a new trial. (39 RT 7234; 11 CT 2904.)

While it appears that Donna Tucker had been relocated, appellant has failed to identify in the record any evidence showing that Donna had been provided with relocation funds from the prosecution or that her rent had been paid by the prosecution. Moreover, the fact that Donna relocated was not exculpatory within the meaning of Penal Code section 1054.1, subdivision (e) or *Brady* because the information does not help the defense or hurt the prosecution. (*United States v. Bagley, supra*, 473 U.S. at pp. 676, 682; *In re Sassounian, supra*, 9 Cal.4th at p. 544.) As correctly argued by the prosecutor, the fact that Donna Tucker relocated was due to threats from the Verdugo family. Her desire to testify despite the threats that were made to her would presumably make her an even more credible witness. Consequently, no discovery violation and no *Brady* error occurred with respect to information about Donna relocating.

Even if the relocation information is found to be exculpatory, *Brady* error did not occur because the information was not material, and any discovery violation was harmless. (*United States v. Bagley, supra*, 473 U.S. at p. 682; *People v. Superior Court (Zamudio), supra*, 23 Cal.4th at p. 210; *In re Sassounian, supra*, 9 Cal.4th at p. 544; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

As mentioned earlier, the need for Donna Tucker to relocate would only bolster Donna's credibility. Apart from his admissions to Donna that he committed the murders, appellant made several other admissions. Appellant also wrote a letter to his sister Pauline in which he admitted committing the murders and admitting that his fingerprints were on the shotgun shells found by

the police and that the police had the eyeglasses that he wore that night. (21 RT 4043-4044; 22 RT 4115-4119; 27 RT 5057-5066.) When appellant was arrested, he had an unmailed letter in his pocket written to Pauline. In that letter, he told Pauline to destroy everything. (27 RT 5067.)

As set forth more fully in Section II.D, there was substantial evidence establishing appellant's identity as the murderer and his motive for killing the victims. (9 RT 1492-1498, 1536, 1658-1661, 1697-1698; 10 RT 1736-1737, 1895, 1899-1902, 1907-1910; 11 RT 1946, 1948-1949, 1976, 1983-1985, 1993-1994, 2009-2014, 2020; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671; 17 RT 3188; 21 RT 4022-4023.)

There was substantial evidence of appellant attempting to avoid apprehension. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 17 RT 3164-3169, 3170-3172; 20 RT 3707; 30 RT 3791; 21 RT 4007-4011, 4028-4029, 4033; 22 RT 4112; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Appellant undermined his own credibility by introducing into evidence eyeglasses that were falsely purported by his brother Paul and his father Sal to be those that he wore at the party and had been left on the refrigerator in his house for the two years following his arrest. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.) Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

In light of the foregoing evidence presented at trial, it was not reasonably probable that appellant would have received a more favorable result at trial had no error occurred regarding the relocation information about Donna. Consequently, any discovery violation was harmless and to the extent that the information may be considered exculpatory, it was not material under *Brady*. This claim fails.

K. Appellant Suffered No Prejudice

Appellant also argues that he suffered cumulative prejudice from the aforementioned allegations of discovery violations and *Brady* error. (AOB 124.) As explained above, each individual claim of appellant fails on its own. Consequently, appellant has suffered no prejudice at all. Consequently, appellant's claims of discovery violations and *Brady* error fail.

IV.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO QUESTION MARY ALICE BALDWIN REGARDING PSYCHIATRIC TREATMENT RECEIVED BY DONNA TUCKER

In his fourth claim, appellant argues that the trial court erroneously denied his request to elicit testimony from Mary Alice Baldwin regarding psychiatric treatment received by Donna Tucker. Appellant asserts that the trial court's denial deprived him of his right to due process and a fair trial, his right to confront witnesses against him, his right to present a defense, his right to a reliable determination of guilt and penalty, and his right to fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article 1, sections 7, 15, 16, 17, and 28 of the California Constitution. (AOB 126-130.) Respondent submits that the trial court properly denied appellant's request to have Ms. Baldwin testify whether Donna had received psychiatric treatment and whether Donna had a mental condition that

would affect her credibility.

A. Relevant Proceedings At Trial

The testimony of Donna Tucker is summarized in Section I.A.9 of the Statement of Facts, *supra*. During the defense case, appellant's trial counsel asked Mary Alice Baldwin, appellant's sister, whether Donna was "mentally stable" and whether Mary ever saw "anything about [Donna] that [she] thought was unusual." The prosecution objected on relevance grounds to this line of questioning. The trial court sustained the prosecution's objections. (28 RT 5220-5221.)

Outside the presence of the jury, appellant's trial counsel made an offer of proof that Donna Tucker had been admitted to a psychiatric hospital three months earlier and that evidence of her psychiatric treatment was relevant to her credibility. The prosecutor informed the court that he had no knowledge of Donna having received psychiatric care. (28 RT 5221-5223.)

The trial court observed that speaking to counselors or psychiatrists is not necessarily probative of a person's credibility. The trial court also observed that it is understandable for a person who was going through a divorce, as Donna Tucker was, to speak with counselors. (28 RT 5223-5224.)

Appellant's trial attorney requested that he be allowed to ask Mary about the "unusual crying and laughing" by Donna which Donna also did in the courtroom during her testimony. The trial court found that Mary's testimony on that subject was irrelevant. The trial court also found that Mary was not "any kind of expert" on the subject of mental health. (28 RT 5224-5225.) The trial court explained as follows one possible way for appellant's trial counsel to present evidence regarding Donna Tucker's psychiatric treatment, if any:

> I agree with you if you had some psychiatrist that treated her that said she's got a mental problem that affects her perception or truth-telling abilities or something like that, that's a different can of worms.

And it may well be that if there is a conviction and at some point there's a motion for new trial, you bring all this in and you show me that you made a diligent effort to find it and that it couldn't be produced then maybe you get a new trial if there is a conviction.

But, you know, right now the issue is whether you can get this in through an inappropriate source and that's what I'm trying to tell you.

I mean, if you had a psychiatrist sitting up here, it would be a different thing, but you know, you've got a lay witness and she's talking about laughing and crying and crying and laughing and I don't know anything about the significance of that. I don't have the context or anything else. It's –

[APPELLANT'S TRIAL COUNSEL]: Yes, sir.

[THE COURT]: – very general. As I say, just the fact that she's, quote, according to you, committed to a mental hospital, I mean, that's what the family is telling you. I mean, it may be that something – I don't know. Did they tell you when it was?

[APPELLANT'S TRIAL COUNSEL]: I just know that on speaking to – Mike Verdugo last night he says, George, I pay her bills. I even pay her psychiatric bills, hospital bills.

[THE COURT]: Yeah, but that could be some kind of out-patient counseling for the stress of the divorce.

[APPELLANT'S TRIAL COUNSEL]: You're right.

[THE COURT]: So I'm just saying, as you present it to me right now, it's too vague and general. You're going to have to get specific with a witness that's qualified. That's all I'm telling you.

[APPELLANT'S TRIAL COUNSEL]: Yes, sir.

(28 RT 5226-5228.)

B. Relevant Legal Principles

A defendant has a constitutional right to present a defense. (*Washington v. Texas, supra,* 388 U.S. at p. 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *People v. Cornwell, supra,* 37 Cal.4th at p. 82). However, a state court's application of ordinary rules of evidence such as Evidence Code section 352 generally does not infringe on the right to present a defense. (*People v. Cornwell, supra*, 37 Cal.4th at p. 82, citations omitted.) If the evidence is not vital to the defense, due process will not require its omission. (*Ibid.*, citations omitted.) In *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297], the United States Supreme Court "determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of the case before it, but it did not question 'the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'" (*People v. Cornwell, supra*, 37 Cal.4th at p. 82, quoting *Chambers v. Mississippi, supra,* 410 U.S. at pp. 302-303.)

"'Exclusion of evidence as more prejudicial, confusing or distracting than probative, under Evidence Code section 352, is reviewed for abuse of discretion.'" (*People v. Cornwell, supra*, 37 Cal.4th at p. 81, quoting *People v. Holloway, supra,* 33 Cal.4th at p. 134.) "'[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion.'" (*People v. Cornwell, supra*, 37 Cal.4th at p. 81, quoting *People v. Babbitt* (1988) 45 Cal.3d 660, 684.) In addition, absent a manifest abuse of discretion, an appellate court will affirm the trial court's determination whether there is a proper foundation for expert testimony. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.)

C. Testimony From Mary Alice Baldwin Regarding Alleged Psychiatric Treatment of Donna Tucker Was Irrelevant And, Even If Relevant, Not So Vital To The Defense Case That Due Process Required Its Admission

Although appellant's trial attorney requested to ask Mary about Donna Tucker's mental condition in hopes of impeaching Donna's credibility, the testimony of Mary on this point was irrelevant, and even if relevant, not of vital or significant probative value. (*People v. Cornwell, supra*, 37 Cal.4th at p. 82; *People v. Babbitt, supra*, 45 Cal.3d at p. 684.) Appellant's trial counsel did not even attempt to lay a foundation that Mary was qualified to render an expert opinion regarding psychiatric or mental conditions and whether such conditions may affect a person's ability to perceive events. (Evid. Code, § 801.)

Even if appellant had presented properly-admitted evidence that Donna Tucker underwent psychiatric treatment or suffered from a psychiatric condition, he would not have been allowed to offer opinion testimony, expert or otherwise, that Donna was not being truthful. "The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful." (*People v. Coffman* (2004) 34 Cal.4th 1, 82, citing Evid.Code, §§ 801, subd. (a); see *People v. Cole* (1956) 47 Cal.2d 99, 103).) Had appellant properly established that Donna had received psychiatric treatment or suffered from a psychiatric condition, appellant could only have offered expert testimony regarding the effect, if any, such a condition would have had on her. (*People v. Long* (2005) 126 Cal.App.4th 865, 871, citing *People v. Russell* (1968) 69 Cal.2d 187, 196.)

The trial court clearly instructed appellant's trial attorney that this line of inquiry was not foreclosed completely. Rather, appellant needed to call a

qualified expert to testify about such matters. Accordingly, no due process violation occurred.

D. Even If Error Occurred, No Prejudice Resulted

Even if the trial court erred in excluding Mary's testimony, reversal is not warranted in this case unless it is reasonably probable that appellant would have received a more favorable result absent the error. (*People v. Marks, supra*, 31 Cal.4th at pp. 226-227; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1125; *People v. Watson, supra*, 46 Cal.2d at p. 836.) There was overwhelming evidence of appellant's guilt offered from witnesses other than Donna Tucker. Appellant told Ray Muro at the party that he would retaliate for the attack on Mike Arevalo and testimony shows that he left the party with a shotgun intent on carrying out the retaliation. (9 RT 1492-1498, 1536; 10 RT 1899-1900, 1902; 11 RT 1946, 1948-1949, 1976-1977, 2009-2014; 17 RT 3188.)

Firefighter Jones identified appellant as the shooter. Jones and Firefighter Quintana heard the shotgun blasts that killed the victims, and they heard Yolanda plead with appellant to not shoot her. The car they saw at the scene of the murders matched the description of appellant's car. Appellant's eyeglasses were found at the scene of the murders. (10 RT 1895; 12 RT 2062-2073, 2086, 2089-2092, 2110-2111, 2114, 2119, 2123-2132, 2135-2136, 2139-2142, 2145-2154, 2176-2177, 2183, 2186-2188, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319; 14 RT 2631-2632, 2638, 2670-2671.) Appellant met Mike Arevalo later in the evening, after the time of the shooting, and informed him that the "situation had been handled." (9 RT 1658-1661, 1697-1698; 10 RT 1736-1737, 1907-1910; 11 RT 1983-1985, 1193-1194, 2020.)

There was substantial evidence of appellant attempting to avoid apprehension. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910, 2967, 2970-2975; 20 RT 3707; 30 RT 3791.) With Sal's assistance, appellant

attempted to avoid apprehension by fleeing the Los Angeles area following the crimes. He spent several weeks moving in various areas including West Covina, Oceanside, San Diego, San Bernardino, Arizona, and Mexico. When he finally returned to Los Angeles, he was discovered in a hidden compartment in a closet in Sal's home. He went to the hidden compartment because he saw that police officers were outside the house. (17 RT 3164-3169, 3170-3172; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Moreover, appellant demonstrated his own lack of credibility by introducing into evidence eyeglasses that were falsely purported by his brother Paul and his father Sal to be those that he wore at the party and had been left on the refrigerator in his house for the two years following his arrest. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.) Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

In light of the foregoing evidence, it was not reasonably probable that appellant would have received a more favorable result at trial had trial counsel been allowed to ask Mary whether Donna Tucker had a mental condition. This claim fails.

V.

APPELLANT WAS NOT ENTITLED TO HAVE THE JURY INSTRUCTED REGARDING VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE TO MURDER AS TO RICHARD RODRIGUEZ

In his fifth claim, appellant argues that the trial court erroneously failed to instruct the jury regarding voluntary manslaughter as a lesser included offense to murder as to Richard Rodriguez. Appellant claims that the instructional error violated his rights to due process, a fair trial, a reliable determination of guilt and penalty, jury trial, and fundamental fairness under the

Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 131-141.) Respondent submits that appellant was not entitled to voluntary manslaughter instructions because there was no evidence to support such a theory as to the murder of Richard Rodriguez and no due process violation occurred within the meaning of *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392], because the jury was instructed as to second degree murder with respect to Richard Rodriguez.

A. Relevant Proceedings At Trial

The trial court found sufficient evidence to instruct the jury regarding voluntary manslaughter as to Yolanda Navarro. There was evidence that appellant was provoked to kill because of the attack on Mike Arevalo by the female party guest, and appellant mistook Yolanda for the female party guest. The trial court found there was not sufficient evidence to support instructing the jury regarding voluntary manslaughter as to Richard Rodriguez. There was no indication that a male party guest was involved in the attack on Mike Arevalo. (28 RT 5309-5315.)

The jury was given jury instructions regarding first degree murder and second degree murder for the killings of Richard and Yolanda. (9 CT 2467-2472, 2479-2480, 2488-2489; 29 RT 5615-5620, 5626-5627, 5631-5633.) The jury also was instructed regarding heat of passion regarding the killing of Yolanda and that voluntary manslaughter was a lesser included offense to the murder. (9 CT 2473-2478, 2481, 2488; 29 RT 5620-5627, 5631-5633.)

B. Relevant Legal Principles

Penal Code section 192 defines manslaughter as "the unlawful killing of a human being without malice." (See *People v. Manriquez* (2005) 37 Cal.4th 547, 583.) Voluntary manslaughter is the offense when the killing is "upon a

sudden quarrel or heat of passion." (Pen. Code, § 192, subd. (a); *People v. Manriquez, supra*, 37 Cal.4th at p. 583.) Manslaughter is a lesser, necessarily included offense to that of intentional murder. (*People v. Manriquez, supra*, 37 Cal.4th at p. 583; *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

"Although section 192, subdivision (a), refers to sudden quarrel or heat of passion, the factor which distinguishes the heat of passion form of voluntary manslaughter from murder is provocation." (*People v. Manriquez, supra*, 37 Cal.4th at p. 583 (citations and quotations omitted).) The provocation which causes the defendant to kill in the heat of passion "must be caused by the victim . . . or be conduct reasonably believed by the defendant to have been engaged in by the victim." (*Ibid.* (citations omitted.) In addition, the victim's conduct "must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id.* at pp. 583-584.)

Heat of passion for manslaughter has an objective component and a subjective component. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584; *People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.) "The defendant must actually, subjectively, kill under the heat of passion." (*People v. Manriquez, supra*, 37 Cal.4th at p. 584 (citing *People v. Wickersham, supra*, 32 Cal.3d at p. 327.) The circumstances that create the heat of passion also must be viewed objectively. The "heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances." (*People v. Manriquez, supra*, 37 Cal.4th at p. 584 (quoting *People v. Logan* (1917) 175 Cal. 45, 49.) The defendant's heat of passion must be "due to sufficient provocation" to satisfy the objective element. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584, citations and quotations omitted.)

"A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser

offense." (*People v. Manriquez, supra*, 37 Cal.4th at p. 584, citing *People v. Breverman, supra*, 19 Cal.4th at p. 162.) The evidence will be considered "substantial" if a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584; *People v. Breverman, supra*, 19 Cal.4th at p. 162.)

On appeal, a de novo standard of review is applied to claims that a lesser included offense instructions regarding voluntary manslaughter should have been given. (*People v. Manriquez, supra*, 37 Cal.4th at p. 584.)

C. There Was Insufficient Evidence Of Provocation From Richard Rodriguez To Justify Voluntary Manslaughter Instructions As To His Murder

Appellant now contends that voluntary manslaughter instructions should have been given as to Richard Rodriguez due to the combination of evidence showing appellant being upset about the attack on Mike Arevalo and the possibility that Richard Rodriguez caused the car accident that occurred between his car and Richard's car immediately before the shootings. (AOB 139.) Appellant's argument lacks merit.

Instructive on this point is *People v. Barton* (1995) 12 Cal.4th 186. In *Barton*, the defendant's daughter was threatened by the victim during a traffic incident. The car driven by the defendant's daughter had stalled in an intersection. The victim honked his car horn and swerved in front the defendant's daughter causing her to have to move to the side of the road to avoid a collision. The victim drove next to the defendant's daughter and spat on the passenger's side window. (*Id.* at p. 191.) The defendant's daughter told her father, the defendant, about the incident. They eventually found the victim in a store and confronted him. During the confrontation, the victim called the defendant's daughter a "bitch" and acted as if he were "berserk." The victim also assumed a "fighting stance," and challenged the defendant. After the

defendant's daughter called the police, the victim went to enter his car. The defendant asked the victim where he was going. The victim replied, "[N]one of your fucking business," and taunted the defendant by saying, "Do you think you can keep me here?" The defendant screamed, swore, and ordered the victim to "drop the knife" and get out of his car. He also threatened to the victim if he did not do so. This Court found the evidence "provided substantial evidence from which a reasonable jury could conclude that when [the] defendant killed [the victim], [the] defendant's reason was obscured by passion to such an extent as would cause an ordinarily reasonable person to act rashly and without reflection, and that [the] defendant thus shot [the victim] in a sudden quarrel or heat of passion." (*Id.* at p. 202.)

In contrast, the present case contains no evidence that appellant killed Richard Rodriguez due to a sudden quarrel or heat of passion. Even if the evidence could possibly show that Richard Rodriguez caused the car accident, a car accident which caused such minimal damage is insufficient to cause an ordinary reasonable person to act rashly and without reflection. The traffic incident in *Barton* showed the victim engaged in aggressive, "road rage" behavior toward the defendant's daughter. Here, there was no evidence of such aggressive conduct by Richard toward appellant before the shootings. In addition, unlike the victim's conduct in *Barton*, there is no evidence that Richard made any provoking statements to appellant prior to the shooting or attempted to use or display a weapon against appellant.

Furthermore, appellant cannot bootstrap his feelings in response to the attack on Mike Arevalo to establish that he was acting in the heat of passion. This Court clearly has held that the provocation which causes the defendant to kill in the heat of passion "must be caused by the "victim" or must be conduct "reasonably believed by the defendant to have been engaged in by the victim." (*People v. Manriquez, supra*, 37 Cal.4th at p. 583.) There was no evidence

showing that Richard or any other male party guest was responsible for the attack on Mike Arevalo, and there is no evidence from which appellant could have "reasonably believed" that Richard was responsible in some way for the attack. Consequently, there is no evidentiary basis for voluntary manslaughter instructions as to Richard's murder.

D. Appellant Was Not Denied Due Process Within The Meaning Of *Beck v. Alabama*

Appellant contends that the failure to instruct the jury regarding voluntary manslaughter as to the killing of Richard Rodriguez violated his right to due process within the meaning of *Beck v. Alabama, supra*, 447 U.S. 625. (AOB 133-138.) Appellant is mistaken.

In *Beck,* the United States Supreme Court held a sentence of death may not be imposed, consistent with the Eighth and Fourteenth Amendments, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense supported by the evidence. (*Beck v. Alabama, supra,* 447 U.S. at p. 627; see *People v. Rogers* (2006) 39 Cal.4th 826, 874, fn.. 20.) The United States Supreme Court subsequently held that the Eighth Amendment is satisfied when a capital jury is presented with any applicable lesser included, non-capital offense. The jury need not be instructed as to every applicable lesser included offense. (*Schad v. Arizona* (1991) 501 U.S. 624, 645-648 [111 S.Ct. 2491, 115 L.Ed.2d 555]; *People v. Rogers, supra*, 39 Cal.4th at p. 874, fn. 20; *People v. Breverman, supra*, 19 Cal.4th at p. 167.)

As to the murder of Richard Rodriguez, the jury was instructed on first and second degree murder and that second degree murder was a lesser crime to first degree murder. (9 CT 2467-2472, 2479-2480, 2488-2489; 29 RT 5615-5620, 5626-5627, 5631-5633.) Appellant has not challenged the correctness of the second degree murder instructions as to Richard's death. Therefore, appellant's rights within the meaning of *Beck* are satisfied because the jury was

presented with at least one applicable lesser included, non-capital offense. (*Schad v. Arizona, supra*, 501 U.S. at pp. 645-648; *People v. Rogers, supra*, 39 Cal.4th at p. 874, fn. 20; *People v. Breverman, supra*, 19 Cal.4th at p. 167.)

E. Even If Instructional Error Occurred, Any Error Was Harmless

In *People v. Demetrulius* (2006) 39 Cal.4th 1, 24-25, this Court applied the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (reversal for constitutional error required unless error was harmless beyond a reasonable doubt), to a claim of whether the failure to provide voluntary manslaughter instructions was harmless. In the present case, even if the evidence of provocation somehow warranted instructing the jury regarding voluntary manslaughter as to the death of Richard, any error was harmless beyond a reasonable doubt. The jury was instructed regarding voluntary manslaughter and heat of passion regarding the killing of Yolanda. (9 CT 2473-2478, 2481; 29 RT 5620-5627.) However, the jury rejected that theory and found him guilty of first degree murder for the killing of Yolanda. (10 CT 2515.) If the jury rejected the theory of heat of passion as to Yolanda, the woman appellant believed personally responsible for the attack on Mike Arevalo, there is no reasonable possibility they would have found appellant acted under heat of passion with respect to someone who had nothing to do with the attack. Accordingly, any error with respect to the heat of passion instructions at trial was harmless beyond a reasonable doubt. This claim fails.

VI.

THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY REGARDING THE EFFECT OF VOLUNTARY INTOXICATION ON APPELLANT'S ABILITY TO FORM SPECIFIC INTENT

In his sixth claim, appellant claims that the trial court erroneously failed to instruct the jury, sua sponte, regarding the effect of voluntary intoxication on

his ability to form specific intent. (AOB 142-145.) This claim is meritless.

Mike Arevalo testified that he saw appellant drink one or two beers at the Halloween Party. (9 RT 1640.) Appellant testified that he drank two beers at the Halloween Party. He could not finish a third beer so he poured it out in a sink and filled the beer bottle with water. (26 RT 4910.) Appellant did not drink any other alcoholic beverages at the party. (26 RT 4911.) Appellant's trial attorney did not request that the jury be instructed regarding the effect of voluntary intoxication on appellant's ability to form specific intent, and no such instruction was given sua sponte by the trial court. (9 CT 2426-2514.)

Since the abolition of the diminished capacity defense, voluntary intoxication does not constitute a defense to murder. Rather, voluntary intoxication "is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt." (*People v. Saille* (1991) 54 Cal.3d 1103, 1120.) It is well settled that the trial court has no sua sponte duty to give "instructions regarding the actual effect of the defendant's voluntary intoxication on his relevant mental state, such as specific intent, premeditation, or deliberation. [Citation.] Instead, these instructions are more in the nature of pinpoint instructions required to be given only on request where the evidence supports the defense theory." (*People v. Ervin* (2000) 22 Cal.4th 48, 90-91; see *People v. Saille, supra*, 54 Cal.3d at p. 1119.) Evidence of voluntary intoxication may not be considered in determining whether the defendant committed murder based upon an implied malice theory. However, it is relevant and may be considered in determining whether express malice existed, and on the issue of premeditation and deliberation. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1126.)

Consequently, appellant's instructional error claim fails because it is well settled that trial courts are not required to instruct a jury, sua sponte, regarding

the effect of voluntary intoxication on the defendant's ability to form specific intent. (*People v. Bolden* (2002) 29 Cal.4th 515, 559; *People v. Hughes* (2002) 27 Cal.4th 287, 342; *People v. Lewis* (2001) 25 Cal.4th 610, 650; *People v. Ervin, supra*, 22 Cal.4th at pp. 90-91; *People v. Saille, supra*, 54 Cal.3d at p. 1120.)

The evidence did not justify instructing the jury regarding voluntary intoxication even if appellant had requested the instructions. A defendant is entitled to voluntary intoxication instructions "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "'actual formation of specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677, quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1119; see also *People v. Saille, supra*, 54 Cal.3d at p. 1117.) Here, although there was some evidence that appellant drank beer at the party, there was no evidence that he actually was intoxicated. (*People v. Williams, supra*, 16 Cal.4th at pp. 677-678 (testimony from a single witness that the defendant was "probably spaced out" on the morning of the killings and the defendant's comments to the police that near the time of the killings he was "doped up" and "smokin' pretty tough then" not sufficient to justify voluntary intoxication instruction, and even if the evidence "would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent).)

VII.

THE JURY INSTRUCTIONS REGARDING CIRCUMSTANTIAL EVIDENCE WERE PROPER

In his seventh claim, appellant argues that the jury instructions regarding circumstantial evidence given at the guilt phase [46/] and penalty phase[47/] of the

---

46. The trial court read the jury CALJIC No. 2.01 before the guilt phase deliberations. CALJIC No. 2.01 was given to the jury before the penalty

phase deliberations, but was not re-read to the jury. (9 CT 2432; 10 CT 2553; 29 RT 5591-5592; 35 RT 6329-6336 (CALJIC No. 2.01 given to jury but not reread for the jury).) The trial court instructed the jury as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that defendant is guilty of the crime but cannot be reconciled with any other rational conclusion.
>
> Furthermore, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilty must be proved beyond a reasonable doubt.
>
> In other words, before an inference essential to establish guilt may have been found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests - - upon which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt.
>
> If, on the other hand, one interpretation of the evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(29 RT 5591-5592.)

47. The trial court also read the jury CALJIC No. 8.83 before the guilt phase deliberations. CALJIC No. 8.83 was given to the jury before the penalty phase deliberations, but was not re-read to the jury. (9 CT 2485; 10 CT 2606; 29 RT 5629-5630; 35 RT 6329-6336 (CALJIC No. 8.83 given to jury but not re-read for the jury).) The trial court instructed the jury as follows:

> You are not permitted to find a special circumstance alleged in this case to be true based on the circumstantial evidence unless the proved circumstance is not only consistent with the theory that the special circumstance is true but cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of the special circumstance must be proved beyond a reasonable doubt.
>
> In other words, before an inference essential to establish

trial undermined the constitutional requirement of proof beyond a reasonable doubt. (AOB 146-152.) Respondent disagrees.

Appellant asserts that the flaw in the circumstantial evidence instructions is that if the jury finds one interpretation of the circumstantial evidence reasonable and another interpretation to be unreasonable, the jury is instructed that it must "accept" the reasonable interpretation. This flaw, argues appellant, undermines the requirement that guilt and the special circumstance must be proved beyond a reasonable doubt. (AOB 146-149.) Appellant concedes, however, that this Court rejected the same argument in *People v. Wilson* (1992) 3 Cal.4th 926, 942-943. (AOB 151, fn. 21.) In fact, this Court has repeatedly rejected the same argument. (*People v. Carter* (2005) 36 Cal.4th 1114, 1188; *People v. Millwee* (1998) 18 Cal.4th 96, 160; *People v. Bradford* (1997) 15 Cal.4th 1229, 1346-1347; *People v. Bradford* (1997) 14 Cal.4th 1005, 1054; *People v. Ray* (1996) 13 Cal.4th 313, 348; *People v. Davis* (1995) 10 Cal.4th 463, 521; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Mickey* (1991) 54 Cal.3d 612, 669-671). Appellant "submits that the issue was wrongly decided and should be reconsidered." (AOB 151, fn. 21.) However, he offers no new or persuasive reasons for why this Court should now find the

---

> a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of the special circumstance and the other to its untruth, you must adopt that interpretation which points to this untruth and reject the interpretation which points to its truth.
>
> If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(29 RT 5629-5630.)

circumstantial evidence instructions to be unconstitutional. Accordingly, this claim fails.

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

In his eighth claim, appellant argues that the jury instructions regarding the meaning of life without the possibility of parole confused the jury and that the trial court erroneously provided incorrect instructions regarding life without the possibility of parole in response to a question asked by the jury. He claims that the jury instructions were erroneous within the meaning of *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133], and that he was denied the right to due process, the right to a fair trial, the right to a reliable determination of penalty, and the right to fundamental fairness under the Fifth, Sixth, Eight, and Fourteenth Amendments and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 152-163.) Appellant's claim lacks merit.

A. Relevant Proceedings At Trial

At the penalty phase of the trial, the trial court read the jury CALJIC No. 8.84 which states in pertinent part:

> It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without the possible [sic] of parole in any case in which the special circumstances alleged in this case has been specifically found to be true. Under the law for this state you must now determine which of these penalties shall be imposed on the defendant.

(35 RT 6330; 10 CT 2539; see also 35 RT 6334 ("It's now your duty to determine which of these two penalties, death or confinement in the state prison

for life without the possibility of parole shall be imposed upon the defendant"), 35 RT 6335 ("To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole").)

During the jury deliberations, the jurors sent a note to the trial court asking the following question: "In the event the defendant is given life in prison without the possibility of parole, is he still given a parole hearing and a chance of being released?" (35 RT 6338; 10 CT 2537.) Appellant's trial attorney argued that the trial court should instruct the jury that "life without possibility of parole means exactly what that means." (35 RT 6338.) The trial court's tentative ruling was that the jury would be told that they were instructed regarding the law and should not speculate about matters for which there were no instructions. (35 RT 6339.) Although the prosecutor initially believed that a capital inmate is still given a parole hearing, the prosecutor was unable to identify any legal authority that a hearing is actually ordered. The prosecutor thereafter submitted on the trial court's tentative ruling. (35 RT 6338-6340.) The trial court then wrote out the following instruction to be given to the jury:

> You were instructed on the applicable law and should not consider or speculate about matters of law on which you were not instructed in arriving at a verdict of death or life in prison without the possibility of parole.

(35 RT 6341.) The jury did not send any additional inquiries to the trial court regarding the meaning of life without the possibility of parole before finding that the defendant should be sentenced to death.

B. The Trial Court Properly Responded To The Jury's Question Regarding The Meaning Of Life Without The Possibility Of Parole

Because the prosecutor argued that appellant posed a continuing threat of dangerousness, appellant argues that the trial court had a sua sponte duty to

instruct the jury that life without the possibility of parole meant that appellant would never be released on parole and that the trial court should have clarified the definition of life without the possibility of parole in response to the jury's question.[48] (AOB 159-162.)

The present case is similar to *People v. Snow* (2003) 30 Cal.4th 43. In *Snow*, during the penalty phase of the capital trial, the jury sent a note to the trial court asking, "If we give life imprisonment without the possibility of parole, can we be assured he will never be[] released from prison." (*Id.* at p. 123.) The defendant's attorney, as appellant's counsel did herein, asked that the jury be instructed that "life imprisonment without the possibility of parole means exactly what it said." (*Ibid.*) The trial court told the jury to reread the instructions and that "we will have you apply common meaning to the two possible verdicts of death or life without the possibility of parole." (*Ibid.*) This Court held that the trial court properly instructed the jury because the common meaning of "'life without the possibility of parole' is that the defendant will be imprisoned for the rest of his life, without any possibility of release on parole.'" (*Ibid.*) This Court also held that the instruction satisfied the following holding in *People v. Kipp* (1998) 18 Cal.4th 349:

> that when the jury expresses a concern regarding the effect of a life without parole sentence, the court should instruct the jury to "to *assume* that whatever penalty it selects will be carried out" or give "a comparable instruction."

(*People v. Snow, supra*, 30 Cal.4th at p. 123, quoting *People v. Kipp, supra*, 18 Cal.4th at pp. 378-379.)

---

48. Appellant speculates that "it can be readily inferred that the jury was seriously considering a sentence of life without the possibility of parole, but would not render such a verdict if appellant could be paroled." (AOB 162.) However, there is nothing in the appellate record that establishes what the jury's thought process was in reaching its verdict regarding penalty.

In the present case, the jury's question regarding life without the possibility of parole is quite similar to the question asked by the jury in *Snow*. Both juries appeared to be focused on the possibility of release from prison even if a sentence of "life without the possibility of parole" were to be imposed. (Compare 35 RT 6338; 10 CT 2537 ("In the event the defendant is given life in prison without the possibility of parole, is he still given a parole hearing and a chance of being released?"), with *People v. Snow, supra*, 30 Cal.4th at p. 123 ("If we give life imprisonment without the possibility of parole, can we be assured he will never be[] released from prison.").)

The only difference between the trial court's response in the instant case and the trial court's response in *Snow* is that the trial court in *Snow* added that the jury should "apply the common meaning" of life without the possibility of parole. (Compare 35 RT 6341, with *People v. Snow, supra*, 30 Cal.4th at p. 123.) However, it is well settled that the common meaning of "'life without the possibility of parole" is that the defendant will be imprisoned for the rest of his life, without any possibility of release on parole.'" (*People v. Snow, supra*, 30 Cal.4th at p. 123.) Thus, the trial court in the present case was not required to provide further definition regarding the effect of a sentence of life without the possibility of parole. The trial court's instruction to the jury that it had been instructed on the applicable law was sufficient. (35 RT 6341.)

The trial court's response in the present also satisfied the holding of *People v. Kipp* that when the jury expresses a concern regarding the effect of a life without parole sentence, the jury should be instructed to "'to *assume* that whatever penalty it selects will be carried out'" or give "'a comparable instruction.'" (*People v. Snow, supra*, 30 Cal.4th at p. 123, quoting *People v. Kipp, supra*, 18 Cal.4th at pp. 378-379.) The comparable instruction given by the trial court in the instant case is that the jury was told it "should not consider or speculate about matters of law on which you were not instructed in arriving

at a verdict of death or life in prison without the possibility of parole." (35 RT 6341.) Because of the possibility of appellate reversal or gubernatorial commutation or pardon, it would be inaccurate to instruct the jury that the sentence of life without the possibility of parole "*will* inexorably be carried out." (*People v. Kipp, supra*, 18 Cal.4th at p. 378.)

In support of his argument, appellant has misplaced his reliance on *Simmons v. South Carolina, supra*, 512 U.S. at pp. 158-160, *Kelly v. South Carolina* (2002) 534 U.S. 246, 250 [122 S.Ct. 726, 151 L.Ed.2d 670], and *Shafer v. South Carolina* (2001) 532 U.S. 36, 44-45 [121 S.Ct. 1263, 149 L.Ed.2d 178]. (AOB 152-163.) As stated by this Court in *Snow*:

> Three United States Supreme Court decisions stemming from death sentences imposed under South Carolina law are readily distinguishable, in that the juries in those cases were told that the alternative to a death sentence was one of "life imprisonment" without instruction that a capital defendant given such a sentence would not be eligible for parole.

(*People v. Snow, supra*, 30 Cal.4th at pp. 123-124 (citing *Kelly v. South Carolina, supra*, 534 U.S. at p. 250; *Shafer v. South Carolina, supra*, 532 U.S. at pp. 44-45; *Simmons v. South Carolina, supra*, 512 U.S. at pp. 158-160).)

Here, as was the jury in *Snow*, the jury was told that the alternative to death was life imprisonment "without possibility of parole." (35 RT 6330; 10 CT 2539; *People v. Snow, supra*, 30 Cal.4th at pp. 123-124.) As mentioned earlier, the trial court's response in the present case was substantially similar to the response given by the trial court in *Snow*. Consequently, the jury in the penalty phase of appellant's trial was sufficiently instructed that appellant would not be eligible for parole. This claim fails.

IX.

NO ERROR OCCURRED WITH RESPECT TO ADMISSION OF THE VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL

In his ninth claim, appellant contends that the trial court committed prejudicial error by failing to limit the victim impact evidence presented by the prosecution at the penalty phase of the trial. He argues that the victim impact evidence, along with the prosecutor's argument to the jury regarding the victim impact evidence, prevented the penalty phase verdict from being a reasoned moral response. Appellant further argues that he was denied his rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 163-174.) Appellant has failed to demonstrate that error occurred with respect to the victim impact evidence.

Victim impact evidence may be introduced at penalty-phase proceedings under the federal Constitution. (*Payne v. Tennessee* (1991) 501 U.S. 808, 814-815, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720]); *People v. Robinson* (2005) 37 Cal.4th 592, 650.) The Supreme Court rejected the view that victim impact evidence:

> often or even generally "leads to the arbitrary imposition of the death penalty," but observed that if, in a given case, such evidence "is so unduly prejudicial that it renders the trial fundamentally unfair," such a sentence will be overturned on constitutional due process grounds.

(*People v. Robinson, supra*, 37 Cal.4th at p. 651 (quoting *Payne v. Tennessee, supra*, 501 U.S. at p. 825).)

Victim impact evidence also is admissible under section 190.3, factor (a), as a circumstance of the crime. (*People v. Robinson, supra*, 37 Cal.4th at p. 650 (citing cases).) The phrase "circumstances of the crime" from factor (a)

of section 190.3 is not limited to the "immediate temporal and spatial circumstances of the crime," but "extends to [t]hat which surrounds materially, morally, or logically the crime." (*People v. Robinson, supra*, 37 Cal.4th at p. 651 (citations and quotations omitted).) There are limits on what victim impact evidence can be admitted and what argument can be made regarding such evidence. The jury must face its deliberations "soberly and rationally, and should not be given the impression that emotion may reign over reason." (*Ibid.* (citations and quotations omitted).) This Court also has cautioned as follows:

> although a court should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction, still, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*Ibid.* (citations and quotations omitted).)

The victim impact evidence presented by the prosecution at the penalty phase of the trial was summarized in Section II.A of the Statement of Facts, *supra*. Various relatives of Richard Rodriguez including his mother testified about what Richard meant to them. Richard's mother testified about her interaction with Richard before he left home the evening he was murdered, and the events of later in the evening after learning that Richard had been murdered. (31 RT 5796-5843.) Various relatives of Yolanda Navarro, including her mother, also testified about what Yolanda meant to them. Yolanda's mother testified about her interaction with Yolanda before she left home on the night of the murder, and the events of later in the evening after learning that she had been murdered. Yolanda's brother testified about having seen the scene of the murder both before and after having learned that Yolanda was one of the victims. (32 RT 5872-5897, 5908-5953.) Before leaving home on the evening of the murder, Yolanda had recorded several songs onto an audio cassette for her father. All of the songs on the cassette were about losing someone, leaving

someone, having to say goodbye, losing one that was loved and trying to get them back. The prosecution played only a few minutes of the tape for the jury. (32 RT 5955-5956, 5958.)

Appellant acknowledges that victim impact evidence is admissible at the penalty phase of a capital trial. (AOB 164-165.) Although he has summarized the victim impact evidence that was presented, trial counsel's objections to the evidence, and the prosecutor's arguments with respect to the evidence (AOB 166-173), he offers no reasoned explanation of why the quantum of evidence presented at his trial was outside the limits of California or federal law. Without any evidentiary support he criticizes the prosecution for "intend[ing] to arouse and play to the jurors' emotions and sympathies" and for "intend[ing] to arouse the jurors[s'] passions and evoke an emotional rather than a reasoned verdict." (AOB 173.) He criticizes the evidence itself, without any analysis, as being "heart-breaking," "unnecessary," and "overly-dramatic." (AOB 173.)

The victim impact evidence, however, was within the scope of California and federal law. Similar to the victim impact evidence presented in *People v. Brown* (2004) 33 Cal.4th 382, 397-398, the testimony presented "concerned either the immediate effects of the murder - such as . . . [the] description of the circumstances the night of the killing when [the survivors were] informed of the death of the [victims]." Additionally, "[t]o the extent they also recollected past incidents or activities they shared with [the victims], their testimony simply served to explain why they continued to be affected by [the] loss and to show" the victims' uniqueness as human beings." (*Id.* at p. 398, citing *Payne v. Tennessee, supra*, 501 U.S. at p. 823.)

Appellant appears to make a more focused argument with respect to the audiotape of songs that Yolanda had made for her father. He mistakenly claims that the tape was similar to victim impact evidence found to be improperly admitted in *Salazar v. State* (Tex. Crim. App. 2002) 90 S.W.3d 330. (AOB

165-166, 168, 173.) In *Salazar*, the court admitted a 17-minute "video montage" tribute to the murder victim. The montage included 140 photographs of the victim accompanied by emotional music such as "My Heart Will Go On," sung by Celine Dion, and featured prominently in the movie Titanic. (See *People v. Robinson, supra*, 37 Cal.4th at 652, citing *Salazar v. State, supra*, 90 S.W.3d at pp. 333-334.)

Unlike the video montage in *Salazar*, the audiotape of songs that Yolanda made for her father was not a "eulogy" created specifically for the penalty phase of the trial, but rather was made by the murder victim herself, and admitted to show the relationship she had with her father. Moreover, only a portion of the audiotape was played for the jury rather than the entire tape. (32 RT 5955-5956, 5958.) Accordingly, the trial court did not abuse its discretion with respect to admission of the victim impact evidence at the penalty phase of appellant's trial.

Even if error occurred due to too much victim impact evidence being introduced, no prejudice occurred. Had the victim impact evidence been reduced to an appropriate quantum, in light of the evidence of the gruesome nature of the murders and appellant's lack of remorse and efforts to avoid apprehension (see Section II.D, *supra*), such error would have been harmless since it is not reasonably probable a different penalty verdict would have been reached. (See *People v. Beames* (2007) 40 Cal.4th 907, 933.)

X.

APPELLANT HAS FAILED TO ESTABLISH THAT VICTIM IMPACT EVIDENCE MUST BE LIMITED TO FACTS OR CIRCUMSTANCES KNOWN TO HIM AT THE TIME HE COMMITTED THE MURDERS

In his tenth argument, appellant claims that evidence of victim impact of the murders should have been excluded to the extent it related to facts and circumstances unknown to him at the time he committed the murders. (AOB

175-180.) Appellant recognizes that this argument was rejected by this Court in *People v. Roldan* (2005) 35 Cal.4th 646, 732. (AOB 175, fn. 22.) The claim has been rejected in other decisions of this Court. (*People v. Lewis* (2006) 39 Cal.4th 970, 1057; *People v. Robinson, supra*, 37 Cal.4th at p. 652, fn.33; *People v. Stitely* (2005) 35 Cal.4th 514, 565 (photograph of victim admissible even though it did not depict the victim as she appeared to the defendant, evidence of the victim's marriage allowed even though defendant did not know of her marriage); *People v. Pollack* (2004) 32 Cal.4th 1153, 1183 (victim impact evidence not limited to only family members of the victims or those present at the murder scene immediately before or after the murder).) Because appellant offers no new or persuasive reason for this Court to revisit or overturn these earlier decisions, his claim fails.

Appellant also argues that the admission of the victim impact evidence in this case violated his right to due process, was not allowed pursuant to Penal Code section 190.3, factor (a), and violated the Ex Post Facto Clause. He contends that nothing in existing United States Supreme Court precedent or the decisions of this Court at the time he committed the murders even suggested that the amount of victim impact evidence admitted at his trial would have been allowed. (AOB 180-184.) Appellant's argument lacks merit. As explained earlier, the quantum of victim impact evidence admitted at the penalty phase of appellant's trial was within the scope of that found proper in *People v. Brown, supra*, 33 Cal.4th at pp. 397-398. This Court in *Brown* also rejected a due process/ex post facto argument similar to that raised by appellant herein. (*Id.* at pp. 394-395.) Appellant has offered no new or persuasive explanation for revisiting or overturning the decision in *Brown*. Consequently, his claim fails.

XI.

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR AT THE PENALTY PHASE TO CROSS-EXAMINATION OF WILLIAM WRIGHT REGARDING APPELLANT'S REPUTATION

In his eleventh argument, appellant contends that the trial court erred in allowing the prosecutor to cross-examine William Wright at the penalty phase about whether he had heard about various bad acts appellant committed against his sister Pauline. Appellant contends that the error denied his rights to due process, a fair trial, reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments. He also contends that the error violated article I, sections 15 and 17 of the California Constitution. (AOB 184-193.) Respondent submits that the record shows the prosecutor was entitled to cross-examine Mr. Wright regarding the bad acts appellant committed against his sister.

A. Relevant Proceedings

At the penalty phase of the trial, Mr. Wright testified that he was a friend to appellant's family and that he and appellant had been friends for 23 years. Mr. Wright was 17 or 18 years old when he met appellant, who was five to seven years old at the time. As a child, appellant was very quiet, very respectful, and kind of studious. He never saw appellant bully anyone and never saw appellant "raise his voice to anyone except maybe in irritation with a family member." (33 RT 6061-6065.)

On cross-examination, Mr. Wright testified that he did not know of appellant's prior act of having set fire to another person's car. He learned of the act when appellant's trial attorney told him about it. (33 RT 1066; see (18 RT 3440-3450, 3461; 21 RT 3947).)

During a bench conference, the prosecutor inquired whether he could ask if Mr. Wright had heard that Pauline, appellant's sister, had left the Verdugo home because appellant had put a gun to her head and threatened to kill her. The prosecutor said that this incident was mentioned in a taped interview of Donna Tucker. Appellant's trial attorney objected because this information was "completely a surprise" to him and that such information cannot be heard on the tape of the interview. He also argued that the incident was not mentioned in the police officer's notes about the interview. (33 RT 6066-6067.) Appellant's trial counsel also argued that the prosecutor is "going to have the other family members to ask that question of." (33 RT 6068.)

The trial court ordered that the prosecutor would not be allowed to ask the question. However, the trial court also allowed the prosecutor time to produce the tape of the interview and play the portion that refers to the incident. (33 RT 6069 ("As I say, right now I'm ruling against [the prosecutor] out of an abundance of caution and giving [the defense] every benefit. But if [the prosecutor] convinces me it is in the tape and [the defense] has notice of it....").) The trial court also indicated that by listening to the tape the factual dispute could be resolved regarding whether the incident is mentioned on the tape. (33 RT 6070.) After the trial court listened to the tape, the prosecutor was allowed to question Mr. Wright regarding his knowledge of the prior bad acts involving appellant threatening Pauline. (33 RT 6072-6074, 6079-6081.)

Mr. Wright had not heard that appellant wanted to kill one of Pauline's boyfriends because he knew too much about appellant. He had not heard that Pauline ran away from home after appellant had thrown her against a wall and cut her phone lines. Mr. Wright did not hear that appellant had chased Pauline when she ran away and that he pulled a gun on her and threatened to "blow her brains out." (33 RT 6080-6081.)

Additionally, Mr. Wright did not hear that appellant thought it was "really cool to kill two people" and that he had threatened to kill Donna Tucker and his brother Mike. He had not heard that appellant would explain how to use his shotgun and kill people while making it look like a "gang-style killing." (33 RT 6081.) The prosecutor asked Mr. Wright, "Well, did [appellant] know the difference between right and wrong?" Mr. Wright answered, "Well, God, I don't know what [appellant] thought at all." (33 RT 6083.)

Mr. Wright testified on cross-examination that if appellant had ever lied to him, "it was so inconsequential" he could not remember what it was about. (33 RT 6089.) He also never knew appellant "to be violent" at any time. (33 RT 6090.) Mr. Wright also had not heard any details about the murder of the two victims in this case. (33 RT 6090-6091.) He had not heard that prior to shooting Yolanda in the head, execution-style, with a shotgun, that appellant made her beg for her life. (33 RT 6091-6092.) He also did not know that after appellant shot Yolanda he felt so good about it that he "got a rush" from killing her. (33 RT 6092.)

B. The Trial Court Implicitly Found The Prosecutor Had A Good Faith Belief That Appellant Had Threatened Pauline

It is well settled that when a defense witness testifies about the defendant's reputation or character that the prosecution may inquire whether the witness has heard of acts or conduct by the defendant that is inconsistent with the witness's testimony. The prosecution must have a good faith belief that the acts or conduct of the defendant actually took place. (*People v. Ramos, supra*, 15 Cal.4th 1173.) Rulings regarding the admission of evidence are reviewed for an abuse of discretion. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

Here, the record shows that the trial court was aware that the parties disputed whether appellant's bad acts toward Pauline were mentioned in the taped interview of Donna Tucker. Prior to listening to the tape, the trial court

ruled that the prosecutor had not sufficiently demonstrated he was entitled to ask Mr. Wright whether he had heard about the prior bad acts. (33 RT 6069-6070.) After listening to the tape, however, the trial court allowed the prosecutor to proceed with questioning Mr. Wright about whether he had heard of appellant's prior bad acts. It is true that the trial court did not expressly quote statements from the taped interview that supported the prosecutor's belief. (33 RT 6070-6074.) However, it would be completely inexplicable for the trial court to reverse its earlier ruling and allow the prosecutor to engage in this line of questioning had it been confirmed that the bad acts were not mentioned on the tape. Thus, it was not an abuse of discretion for the trial court to allow the prosecutor's line of questioning.

Even if the trial court had erred in allowing the questions about appellant's prior bad acts toward Pauline, the is no reasonable possibility that the error could have influenced the jury. (*People v. Beames*, 40 Cal.4th at p. 933.) In arguing that he was prejudiced, appellant complains about the phrasing of the prosecutor's questions and that the questions themselves were used as "evidence" of prior uncharged crimes. (AOB 190-191.) He is mistaken. Even appellant acknowledges that the jury was expressly instructed that a question from an attorney "is not evidence." (AOB 191-192; 10 CT 2550; 35 RT 6330.)

The thrust of the cross-examination regarding Mr. Wright was to impeach his testimony that appellant did not have a violent character. (33 RT 6061-6065.) Even if the questions about appellant's prior bad acts toward Pauline had been excluded, regardless of their phrasing, the jury still would have learned that Mr. Wright had not heard other information showing appellant's violent character including that appellant thought it was "really cool to kill two people," that he had threatened to kill Donna Tucker and his brother Mike, that he would explain how to kill someone with a shotgun and make it

look like a "gang-style killing," that he shot Yolanda in the head with a shotgun in an execution style, that he made Yolanda beg for her life before killing her, and that he "got a rush" from killing her. (33 RT 6081, 6089-6092.) Moreover, when asked if appellant knew "the difference between right and wrong," Mr. Wright answered, "Well, God, I don't know what [appellant] thought at all." (33 RT 6083.) Thus, Mr. Wright was thoroughly impeached even without the references to appellant's bad acts toward Pauline. Furthermore, in light of the evidence of the gruesome nature of the murders and appellant's lack of remorse and efforts to avoid apprehension (see Section II.D, *supra*), it is not reasonably possible appellant would have received a different result at the penalty phase even if error had not occurred. This claim fails.

XII.

THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY THAT AGE COULD ONLY BE CONSIDERED A MITIGATING FACTOR

In his twelfth argument, appellant asserts that the trial court should have instructed the jury, sua sponte, that his age of 22 could only be considered a mitigating factor after the prosecutor argued that appellant's age could be considered an aggravating factor under the evidence. He contends that the trial court's error violated his right to due process, a fair trial, a reliable determination of penalty, fundamental fairness, as well as his right against cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments. He also claims that the error also violated California Constitution, article I, sections 7, 15, 16, and 17. (AOB 193-200.) Appellant's argument is foreclosed by this Court's decision in *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.

A. Relevant Proceedings

During argument at the penalty phase, the prosecutor observed that appellant's trial attorney may argue that appellant's age at the time of the crime, 22 years old, is a mitigating factor. The prosecutor argued as follows that based on the evidence, appellant's age at the time of the crime was an aggravating factor:

> Factor (i), the age of the defendant at the time of the crime.
>
> Now, [appellant's trial attorney] may get up here and tell you that this is a mitigating factor. Sometimes people might think that this is a mitigating factor, but I think that based on the evidence you have before you, that this actually would be an aggravating factor.
>
> And why do I say that? We know that at the time of the murder [appellant] was 22 years old. He wasn't a kid anymore. He wasn't some 15-, 16-year-old going out and committing two brutal, senseless, double homicides.
>
> We know that he was mature. He was an adult. He was a great person according to his family and his friends and neighbors, which we'll get into.
>
> But the important thing here is that he made choices. He made a lot of choices on October 23rd of 1994. And he was old enough to know what he was doing.
>
> You heard from his family members that he knew the difference between right and wrong, and as a result of this, he must be held fully accountable and responsible for his acts.
>
> And it's time for him to live up to his responsibility. He can never – he does not like to be cornered. You saw that on the witness stand. He will never admit he did anything wrong.
>
> His own family wouldn't even admit that he was a violent person. You heard when I asked Mary Alice about the torching of the car. If that's not violent, what is it?

This close family. Mary Alice said how close they were.

...

...

And she did not know about this torching of a car? Everybody else knew about it. But, no, not [appellant], not my little brother. He's not violent, not [appellant].

(34 RT 6237-6238.)

Following argument by the prosecutor and appellant's trial attorney, the jury was instructed at the penalty phase of the trial regarding the various factors to consider in determining whether the death penalty should be imposed. (10 CT 2541-2542; 35 RT 6331-6333.) One of the factors for the jury to consider is the "age of the defendant at the time of the crime." (10 CT 2542; 35 RT 6332.)

B. The Prosecutor Was Entitled To Argue, And The Jury Was Entitled To Consider, Appellant's Age As An Aggravating Factor

It is well settled that a capital defendant's age can be either an aggravating or mitigating factor. (*People v. Cook* (2006) 39 Cal.4th 566, 618 ("a defendant's youth may be either mitigating or aggravating"); *People v. Panah* (2005) 35 Cal.4th 395, 499-500 ("nor is the trial court constitutionally required to instruct the jury that certain sentencing factors are relevant only to mitigation"); *People v. Jones* (2003) 30 Cal.4th 1084, 1124 ("Age, section 190.3, factor (i), is not necessarily a mitigating consideration. It is a neutral factor, and thus either counsel may make any age-related inference as either aggravating or mitigating."); *People v. Slaughter* (2002) 27 Cal.4th 1187, 1224 (same).)

The instant case is similar to *People v. Hawthorne, supra*, 4 Cal.4th 43. In *Hawthorne*, the prosecutor argued that based on the evidence, the

defendant's age of 22 years old at the time of the murders, the same age as appellant in the present case, should be an aggravating factor. The defendant, as does appellant herein, argued to this Court that "age can only function as a factor in mitigation and the court should have so instructed the jury." (*Id.* at p. 77.) This Court held that "age" in sentencing factor (i) "'is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case.'" (*Ibid.* (quoting *People v. Lucky, supra*, 45 Cal.3d at p. 302).)

The only argument appellant can muster for a change in this Court's line of authority regarding age as a sentencing factor is that this Court's decisions have been undermined by the United States Supreme Court decision in *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]. The issue presented in *Roper* was whether it is permissible under the Eighth Amendment to execute a juvenile offender who was older than 15, but younger than 18. (*Id.* at pp. 555-556.)

The *Roper* court focused solely on those offenders who were younger than 18 rather than offenders who were young, but still older than 18. The court observed that there had been recent movement among the states to abolish the death penalty as to offenders under the age of 18, as well as the lack of a movement toward favoring capital punishment for juveniles. (*Roper v. Simmons, supra*, 543 U.S. at pp. 564-567.)

Next, the court observed that there were "[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders" for purposes of imposition of the death penalty. (*Roper v. Simmons, supra*, 543 U.S. at pp. 568-569.) First, the "'lack of maturity and [] underdeveloped sense of responsibility are found in youth more often than in adults.'" (*Id.* at p. 569,

quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367 [113 S.Ct. 2658, 125 L.Ed.2d 290].) Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (*Ibid.* (citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115 [102 S.Ct. 869, 71 L.Ed.2d 1]).) Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Id.* at p. 590.) Because juvenile offenders have "diminished culpability," the justifications for imposition of the death penalty, retribution and deterrence, "apply to them with lesser force to adults." (*Id.* at p. 571.)

Appellant's argument seeks an extension of the *Roper* decision to those who are older than 18, but "who are still young." (AOB at 199.) However, the *Roper* court anticipated such an argument would be made, and rejected it as follows:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in [*Thompson v. Oklahoma* (1988) 487 U.S. 815 [108 S.Ct. 2687, 101 L.Ed.2d 702]] drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

(*Roper v. Simmons, supra*, 543 U.S. at p. 574.) Appellant has offered no evidence of a movement toward abolition of executions for those who are young, but older than 18. He has offered no explanation for why those who are young, but older than 18, have the same diminished culpability those who are younger than 18 have. In *People v. Hawthorne, supra*, 4 Cal.4th at p. 78, this

Court observed that whatever theoretical relevance the holding in *Thompson v. Oklahoma*, precluding the execution of an offender under 16 years of age may have regarding the execution of a 22-year-old offender, "we do not find it inconsistent with our construction of section 190.3, factor (i)." The same is true with respect to the offender in *Roper*. Consequently, *Roper* is of no assistance to appellant and the trial court had no sua sponte duty to instruct the jury that appellant's age could only be considered a mitigating factor.

XIII.

THE PROSECUTOR DID NOT COMMIT *GRIFFIN* ERROR AT THE PENALTY PHASE OF THE TRIAL

In his thirteenth argument, appellant contends that, in violation of *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], the prosecutor commented on his decision to not testify at the penalty phase of the trial when he argued to the jury that appellant "can't even face you, this defendant, who commits these two brutal senseless murders." Appellant also contends that the error violated his rights to due process and a fair trial, his right against self incrimination, his right to a reliable determination of penalty, and his right to fundamental fairness under the Fifth, Sixth, Eight, and Fourteenth Amendments, as well as California Constitution, article I, sections 7, 15, 16, and 17. (AOB at 200-204; 34 RT 6246.) Respondent submits that appellant is not entitled to a reversal of the penalty judgment due to the prosecutor's conduct.

A. Relevant Proceedings

At the penalty phase, the prosecutor argued that the jury should have no lingering doubt about appellant's guilt. After summarizing the prosecution's evidence regarding appellant's guilt, he made the following argument:

> After you consider all of the evidence – his testimony from the witness stand, all of his lies, everything that he told you that he lied about – why did he lie to you? [¶] Why did he lie if he didn't commit this crime? It's because he did it. And when you consider all of that evidence, there's no doubt. This is a case – this case is overwhelming. There's no doubt that he committed these two murders. There's absolutely no doubt that it was a first degree murder. (34 RT 6243.)

The prosecutor later argued as follows with respect to the defense witnesses at the penalty phase:

> You saw these witnesses testify, and you were able to watch them. You know, they kind of sounded okay on direct examination. Then we started asking them some questions on cross-examination, things sure changed. [¶] You saw their attitudes change, the arrogance of some of these witnesses, just the way they responded to questions, and none of them accepted your verdict. I just couldn't believe. Oh, no, all twelve of you jurors are wrong. Each and every one of you guys made a mistake. You didn't know what you were doing. [¶] But, yet, you know, they didn't know about this piece of evidence. They didn't know about this. They didn't know about that. (34 RT 6245.)

Without stating his grounds, appellant's trial attorney objected to this argument. The trial court overruled the objection. (34 RT 6245.)

The prosecutor continued with the following argument regarding the credibility of the defense witnesses:

> I mean the credibility of these witnesses. For them to come in and say that you didn't do your job after all the time you have spent on this case and how much time you spent in that jury room to come in with this verdict and considering all the evidence and listening to all of the witnesses for the past two months. I just couldn't believe they did that. It's astounding. [¶] You consider that. This is evidence presented by the defense. Evidence presented by the defense in mitigation to get you to feel sorry for this defendant. He can't even face you, this defendant, who commits these two brutal senseless murders. [¶] We know that Sal [Verdugo] lied. Everybody knows he lied. We know that

> Paul [Verdugo] lied. We know that [appellant] lied. He told you himself over and over and over, plus we caught him in all the lies. [¶] None of them – I mean, oh, no, he's a good kid. He's a fun-loving individual, nonviolent. He never lies. He never lies to me. [¶] I just couldn't believe this stuff that we were hearing from these witnesses. (34 RT 6245-6246.)

After the lunch recess, and outside the presence of the jury, appellant's trial attorney moved for a mistrial because the prosecutor commented on appellant's "unwillingness to take the stand at the penalty phase." (34 RT 6260.) Appellant's trial counsel, however, apparently was objecting to a different part of the prosecutor's argument. (34 RT 6260-6261 ("I believe [the prosecutor] indicated that we heard him testify and we don't know what he testified – or what he would have said here, you know, and something to that effect. I'm not quite sure of the exact wording. That's why I wanted to approach at that particular time"); 34 RT 6261 ("I [] believe you commented on the failure of the defendant to take the stand, we don't know what he would have said here because -- but we do know what he said here I believe, or something to that effect. [¶] And that's why I wanted to approach the court at that particular time to address that particular issue").)

The trial court denied the request for a mistrial and informed the attorneys that a curative instruction would be given. The trial court also suggested that the prosecutor clarify his comments to the jury to assure them that "nothing in his comments should be construed to indicate that they can consider [appellant's] failure to testify." (34 RT 6263.)

When the prosecutor resumed his argument, he stated as follows:

> When I talked about [appellant's] testimony in the guilt phase, I didn't mean to imply or – I was not commenting at all on his not testifying in the penalty phase. It is strictly I feel about the fact that he testified in the guilt phase, he lied to you, some of the things he said, and the fact that you can use that testimony, his guilt phase testimony against him in the penalty phase as you can all of the penalty phase evidence. (34 RT 6267.)

After the penalty phase argument, the trial court gave the following instruction:

> The defendant has testified in the guilt phase of the trial. The defendant elected not to testify in the penalty phase of this trial. It is the constitutional right of the defendant to elect to testify in the guilt phase only, or in the penalty phase only, or in both, or in neither.
>
> You're instructed not to consider or discuss the fact that the defendant elected not to testify in the penalty phase. That is a matter that must not in any way affect your verdict as to the penalty. (35 RT 6333; 10 CT 2545.)

B. Relevant Legal Principles

"The Fifth Amendment to the United States Constitution prohibits any comment by the prosecution on a defendant's failure to testify at trial that invites or allows the jury to infer guilt therefrom." (*People v. Monterroso* (2004) 34 Cal.4th 743, 748, citing *Griffin v. California, supra*, 380 U.S. at pp. 611-615.) The prohibition from *Griffin* also applies to commentary by the prosecution about the defendant's failure to testify at the guilt phase of a trial. (*People v. Boyette* (2002) 29 Cal.4th 381, 454.) "'[T]he prosecution may comment upon a defendant's lack of remorse, [but] in doing so it may not refer to the defendant's failure to testify. [Citations.] Similarly, . . . a prosecutor may not urge that a defendant's failure to take the stand at the penalty phase, in order to confess his guilt after having been found guilty, demonstrates a lack of remorse.'" (*Id.* at pp. 453-454, quoting *People v. Crittenden, supra*, 9 Cal.4th at p. 147.) However, "[i]ndirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." (*People v. Monterroso, supra*, 34 Cal.4th at p. 770, quoting *People v. Boyette, supra*, 29 Cal.4th at pp. 455-456; see also *People v. Coffman, supra*, 34 Cal.4th at p. 66; *People v. Vargas* (1973) 9 Cal.3d 470, 478.)

C. Waiver

Appellant has waived the instant claim by failing to raise an appropriate objection at trial. To preserve a claim of *Griffin*-error on appeal, a defendant must have first objected at trial regarding any of the statements claimed to be in error. (*People v. Coffman, supra*, 34 Cal.4th at p. 74; *People v. Hughes, supra*, 27 Cal.4th at p. 372; *People v. Memro* (1995) 11 Cal.4th 786, 873-874; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1050-1051.) The record is clear that appellant's trial attorney did not object to the prosecutor's "[h]e can't even face you" statement. (See 34 RT 6245-6263.) Appellant also has made no argument that any perceived error with respect to this statement would not have been cured through a curative instruction. (*People v. Coffman, supra*, 34 Cal.4th at p. 74; *People v. Hughes, supra*, 27 Cal.4th at p. 372; *People v. Memro, supra*, 11 Cal.4th at pp. 873-874; *People v. Mitcham, supra*, 1 Cal.4th at pp. 1050-1051.) Therefore, appellant is not entitled to relief for his *Griffin* claim.

D. Reversal Is Not Warranted Even If Trial Court Had Preserved The *Griffin*-Error Claim For Appeal

No *Griffin*-error occurred. The prosecutor's overall argument was to characterize the defense penalty case as arrogant with respect to the jury's verdict at the guilt phase. (34 RT 6245 ("You saw their attitudes change, the arrogance of some of these [defense] witnesses, just the way they responded to questions, and none of them accepted your verdict. I just couldn't believe. Oh, no, all twelve of you jurors are wrong. Each and every one of you guys made a mistake. You didn't know what you were doing.").) The prosecutor continued the argument after an objection by appellant's trial counsel was overruled. (34 RT 6245-6246 ("I mean the credibility of these witnesses. For them to come in and say that you didn't do your job after all the time you have spent on this case and how much time you spent in that jury room to come in with this verdict and considering all the evidence and listening to all of the

witnesses for the past two months. I just couldn't believe they did that. It's astounding").) The prosecutor's "[h]e can't even face you" argument essentially tells the jury that they should not be inclined to show mercy to appellant due to his lack of remorse and the arrogance of the remaining defense case. (34 RT 6245-6246.) Because the prosecutor's argument was merely a comment on appellant's lack of remorse rather than his failure to testify at the penalty phase, his argument was proper and not a violation of *Griffin*. (*People v. Boyette, supra*, 29 Cal.4th at pp. 453-454; *People v. Crittenden, supra*, 9 Cal.4th at p. 147.)

Even if the prosecutor's argument were construed to be error under *Griffin*, any error was harmless. The prosecutor's statement, challenged for the first time on appeal, was a brief statement in the course of a lengthy argument. (34 RT 6226-6312.) The argument certainly does not "directly" comment on appellant's failure to testify at the penalty phase of the trial. Moreover, the prosecutor's argument apparently was so mild that during the side bar conference regarding the objection by appellant's trial attorney, the trial court, the prosecutor, and appellant's trial attorney all failed to remember that the statement was made. (34 RT 6245-6263.) Furthermore, the prosecutor specifically informed the jury that he "was not commenting at all on [appellant's] not testifying in the penalty phase." (34RT 6245-6246.) Moreover, the jury was instructed that although appellant testified during the guilt phase, he had the "constitutional right . . . to elect to testify in the guilt phase only" and that the jury was "instructed not to consider or discuss the fact that the defendant elected not to testify in the penalty phase. That is a matter that must not in any way affect your verdict as to the penalty." (35 RT 6333; 10 CT 2545.) Thus, any error that may have occurred, assuming the claim was preserved for appellate review, was harmless. (*People v. Monterroso, supra*, 34 Cal.4th at p. 770; *People v. Coffman, supra*, 34 Cal.4th at p. 66; *People v.*

Boyette, supra, 29 Cal.4th at pp. 455-456; *People v. Vargas, supra*, 9 Cal.3d at p. 478.) This claim fails.

XIV.

NO ERROR OCCURRED WITH RESPECT TO THE SCHEDULING OF THE DEFENSE CLOSING ARGUMENT AT THE PENALTY PHASE OF THE TRIAL

In his fourteenth claim, appellant contends that the trial court erred in adjourning court after the prosecutor completed his closing argument at the penalty phase of the trial, resulting in appellant's trial attorney not starting his closing argument until the next day. Appellant contends that because of the trial court error, he was denied his right to due process, a fair trial, effective assistance of counsel, reliable determination of penalty, and fundamental fairness in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. He also claims that the errors violated his rights under California Constitution, article I, sections 7, 15, 16, and 17. (AOB 204-208.) This claim is meritless.

A. Relevant Proceedings

Prior to the penalty phase arguments, the prosecutor estimated that his argument would be approximately two hours in length, and appellant's trial attorney estimated that his argument would be approximately forty minutes in length. (34 RT 6190.) The prosecutor's argument began during the morning session on July 10, 1997. (34 RT 6186, 6226.) The prosecutor had not completed argument before the lunch break which began at noon. (34 RT 6226-6257.) Appellant's trial attorney asked if a matter could be discussed outside the presence of the jury. Thereafter, the trial court instructed the jurors to return to the courtroom at 1:35 p.m. The trial court also instructed the jurors as follows:

> Keep in mind not to discuss the case or form any opinions until it is finally submitted to you for deliberations.

(34 RT 6257.)

At 1:30, the trial court discussed some jury instructions with counsel. (34 RT 6258-6260.) Appellant's trial counsel then moved for a mistrial due to the prosecutor's argument regarding the victims in the case and because he allegedly commented on appellant's failure to testify at the penalty phase of the trial. (34 RT 6260-6266 ; see Section XIII, *supra.*)

The prosecutor then continued his closing argument. (34 RT 6266-6305.) During the argument, appellant's trial counsel asked to address the court. The trial court inquired of the prosecutor how much argument he had remaining. The prosecutor estimated that he had another ten minutes of argument. The trial court then inquired of appellant's trial counsel how much time his argument would take. Appellant's trial counsel responded, "I don't know. I thought 40, 50 minutes, but it looks like it may go longer." (34 RT 6305.) The following colloquy occurred:

> THE COURT: I just want to try to work out scheduling with the jurors. [¶] What's the feeling of the jury as far as timewise if we take a recess now for about fifteen minutes and [the prosecutor] goes about another ten, [appellant's trial attorney] says he's got about a 45-minute argument.
>
> [APPELLANT'S TRIAL ATTORNEY]: May[be] longer, your honor.
>
> THE COURT: I'm sorry. Maybe longer. Say an hour. [¶] Do you want to quit for the day after [the prosecutor], or do you want to go late?
>
> JUROR NO. 5[[49]]: We'd like a break right now.
>
> THE COURT: Let's do this. Let's take a fifteen-minute

---

49. Juror Number 5 is the foreperson of the jury. (34 RT 6266.)

break now. Maybe you all can discuss scheduling.

> JUROR NO. 5: Okay.
>
> THE COURT: And let my clerk know. Because if – well, if we're going to go late, I should advise the attorneys so they will know whether to be ready or not.
>
> JUROR NO. 5: All right.
>
> THE COURT: Okay.

(34 RT 6305-6306.)

After the recess, the trial court informed the parties that they would finish with the prosecutor's argument and begin the defense argument the next day at 8:45 a.m. (34 RT 6306.) The prosecutor concluded his argument and the proceedings were adjourned at 3:37 p.m (34 RT 6307-6312.) Before the jurors were excused, the trial court instructed them as follows:

> All right. Ladies and gentlemen, I have one brief matter in the morning. So I'll excuse you until 8:45, and then we'll hear . . . argument [from appellant's trial attorney] at that time and my instructions on the law, and the case will be in your hands. So you are excused.
>
> Keep in mind not to discuss either among yourselves or anybody else anything connected with the case and don't form or express any opinions until it is finally submitted to you for your deliberations.
>
> Have a good evening. See you then at 8:45.

(34 RT 6312.) Appellant's trial attorney began his closing argument once the jury arrived for the 9:00 a.m. session of the trial on July 11, 1997. (35 RT 6313-6314.)

B. Waiver

Claims regarding the scheduling, delays, or interruptions of trial court proceedings are subject to the waiver doctrine. (See *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 972.) In the present case, no objection was raised by appellant's trial counsel that the trial court ended proceedings on July 10, 1997, following the end of the prosecutor's closing argument, and before appellant's trial attorney started his own closing argument. (34 RT 6186-6312.) It would appear that an objection would not have been futile because, as for the scheduling of argument, the trial court was concerned only about whether the proceedings would "go late," and if so, whether the attorneys would be prepared to do so. (34 RT 6305-6306.) It would appear that had appellant's trial counsel actually wanted to start his closing argument during the few remaining minutes of the court session on July 10, he would have been allowed to do so. Consequently, this claim has been waived.

C. No Abuse Of Discretion Occurred With Respect To Concluding The Court Proceedings On July 10 And Having Appellant's Trial Attorney Begin His Closing Argument The Following Morning

"There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial." (*Herring v. New York* (1975) 422 U.S. 853, 858 [95 S.Ct. 2550, 45 L.Ed.2d 593].) The total denial of the opportunity for final argument would result in the denial of the right to present a defense. (*Ibid.*) However, the trial court has "great latitude in controlling the duration and limiting the scope of closing summations." (*Id.* at p. 862; *People v. Holloway, supra,* 33 Cal.4th at p. 137.) Appellate review of postponements of trial proceedings is reviewed for an abuse of discretion. (*Stroud v. Superior Court, supra*, 23 Cal.4th at p. 968, citing *People v. Memro, supra*, 11 Cal.4th at p. 852.)

This Court, in *Stroud v. Superior Court*, explained that determining whether a delay was an abuse of discretion is addressed on a case-by-case basis, viewing the totality of the circumstances. Some of the factors to consider are the reason for the delay, the length of the delay, the extent to which it could have been avoided by proper planning and allocation of judicial resources, the frequency, duration, and cause of any prior interruptions, and any evidence, available to the trial court at the time of the delay, that the delay would work against the defendant's litigation interests. (*Stroud v. Superior Court, supra*, 23 Cal.4th at p. 969.)

In the present case, viewing the totality of the circumstances, no abuse of discretion occurred. The reason for the delay was legitimate and non-exceptional. The record shows that there was not enough time for appellant's trial attorney to state his entire closing argument without the jurors having to "go late." Appellant's trial attorney also was unsure exactly how long his argument would take. (34 RT 6305-6306.) The length of time from the close of proceedings on the afternoon of July 10 to the start of proceedings on the morning of July 11, if such a gap of time can even fairly be considered a "delay," is a matter of hours.

Although the prosecutor had completed his penalty phase closing argument, there is no evidence that waiting until the next morning would work against appellant's litigation interests. As mentioned earlier, appellant's trial attorney identified no possible prejudice because he did not object to the scheduling. (See *Stroud v. Superior Court, supra*, 23 Cal.4th at p. 972 (failure to object "foreclosed any meaningful effort" to remedy problems caused by delay).) The trial court did not appear predisposed to refusing any request by appellant's trial attorney to start his closing argument before adjourning on July 10, and then resuming July 11. Yet appellant's trial attorney made no such request. It could very well be that appellant's trial attorney hoped to gain an

advantage by having extra time to prepare for the closing argument and not offend the jurors by having them remain late for a brief, and incomplete argument. Another advantage is that, following his argument and the closing instructions, the jury would commence deliberations with the prosecutor's argument having been over since the previous afternoon, and without the prosecutor having the opportunity to rebut the argument from appellant's trial attorney. Moreover, at the close of the proceedings on July 10, the trial court directly instructed the jury "not to discuss either among yourselves or anybody else anything connected with the case and don't form or express any opinions until it is finally submitted to you for your deliberations." (34 RT 6312.)

For these same reasons, even if error had occurred and the claim preserved for appellate review, any error would have been non-prejudicial because there is no reasonable possibility that the jury would have reached a different penalty verdict absent the error. (*People v. Beames, supra*, 40 Cal.4th at p. 933.) Under these circumstances, it cannot be fairly asserted that the trial court abused its discretion. This claim fails.

XV.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL

In his fifteenth claim, appellant argues that the trial court erroneously denied his motion for a new trial. He claims that because of the error, he was denied his rights to due process, a fair trial, and confrontation of witnesses in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 208-223.) Respondent submits that many of appellant's assertions with respect to the new trial claim were shown to lack merit earlier in this Respondent's Brief. As to the newly raised assertions raised with respect to the new trial claim, respondent submits that appellant has failed to show error by the trial court or

prejudice.

A. Relevant Legal Principles

The trial court has broad discretion in ruling on a new trial motion. The ruling will be disturbed on appeal only for "clear abuse of that discretion." (*People v. Ault* (2004) 33 Cal.4th 1250, 1260.) A new trial motion cannot be granted unless the court first conducts an independent examination of the proceedings to determine whether a miscarriage of justice has occurred. (*Id.* at pp. 1261-1262, citing Cal. Const. art. VI, § 13.) "To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial." (*People v. Ochoa* (1998) 19 Cal.4th 353, 473.)

"[W]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Stanley* (2006) 39 Cal.4th 913, 951; *People v. Nesler* (1997) 16 Cal.4th 561, 582; *People v. Pride* (1992) 3 Cal.4th 195, 260.) The reviewing court may not substitute its reading of the "cold transcript" for the credibility determinations reached by the trial court. (*People v. Stanley, supra*, 39 Cal.4th at p. 951; *Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, 682-683.)

B. Appellant Has Failed To Show That A New Trial Was Warranted Due To His Aforementioned Claim That Donna Tucker Received Witness Relocation Funds And Had Psychiatric Problems As Well As His Aforementioned Claim That He Was Not Allowed To Fully Explain Why He Fabricated Evidence Of The Eyeglasses

Appellant argues that he was entitled to a new trial due to the prosecution not having disclosed evidence that Donna Tucker received witness relocation funds and had psychiatric problems and because he was not allowed to testify about why he had fabricated evidence of his eyeglasses. (AOB 210-211, 213-214, 218, 220-223.) Earlier in this Respondent's Brief, these claims were addressed and shown to lack merit. (See Section II; Section III.I; Section

IV.) For the same reasons asserted, appellant was not entitled to a new trial for these claims. (*People v. Burgener* (2003) 29 Cal.4th 833, 893 ("Inasmuch as we have already rejected each of the clams of error raised in the new trial motion, it follows the denial of the motion was not error").)

C. Appellant Was Not Entitled To A New Trial With Respect To His Claims Regarding Donna Tucker's Feelings Toward Detective Markel And Her Feelings About Being Entitled To Reward Money

Following the jury verdict in the penalty phase, appellant moved for a new trial. The parties filed written briefs and live testimony was presented. The defense argued that a new trial should have been granted because newly discovered evidence showed that Donna Tucker's credibility was affected by her personal feelings toward Detective Markel and because she had been promised reward money. Because this information was not disclosed to the defense, the defense was unable to impeach Donna at trial. (35 RT 6450 - 39 RT 7240; 10 CT 2728-2739, 2753-2766; 11 CT 2785-2793, 2829D-2838, 2840-2904.)

1. The New Trial Hearing

a. Evidence Regarding Donna Tucker's Feelings Toward Detective Markel

Pauline Verdugo, appellant's sister, testified that she had received several letters from Donna Tucker from 1994 through 1998. (35 RT 6450-6454; 36 RT 6705.) In the letters, Donna mentioned the names of the prosecutor and various police officers. (35 RT 6504.) She mentioned Detective Markel in nearly every letter. (35 RT 6505.) Donna also wrote to Pauline that she wanted to get some money so that she and Pauline could live together on their own. (35 RT 6528, 6531.) Pauline did not tell anyone about Donna's feelings toward Detective Markel until she spoke to Paul Verdugo about it in October of 1997. (35 RT 6545-6551, 6565-6566.)

Mary Alice Baldwin also testified that Donna Tucker told her that she had feelings for Detective Markel. (38 RT 7081-7082.) Donna also told Mary that she would testify truthfully at appellant's trial, and that she hoped to continue her relationship with Detective Markel. Donna told Mary that she had a "crush" on Detective Markel. (38 RT 7086.)

Donna Tucker testified that from the time the first search warrant was served at her home in December of 1994, until appellant's arrest, all but one of her conversations with Detective Markel were by telephone. (37 RT 6914.) Donna thought Detective Markel had integrity and compassion and was very kind. Although Donna thought about Detective Markel "a lot," she did not "fall in love" with him. She maintained a professional relationship with Detective Markel.[50] (37 RT 6879, 6882-6883.) She wrote to Pauline that she was "hooked" on Detective Markel and "nuts" for him. (37 RT 6880-6881.) However, she did not want to act on her feelings toward Detective Markel because she was a witness in the case and because Detective Markel had a career and family. (37 RT 6880-6881.)

Donna Tucker denied having lied during her trial testimony and denied having testified in an effort to "attract" Detective Markel. (37 RT 6881.) She admitted that she falsely wrote to Pauline and Michael Verdugo that Detective Markel had watched her from a distance. She told them this false information because she wanted the Verdugo family to believe that she had police protection. She wanted to feel safe and wanted the Verdugo family to not harass her. (37 RT 6886, 6889, 6891-6892.)

Detective Markel testified that he had a "professional" and "detective/witness type of relationship" with Donna Tucker. (36 RT 6587-

---

50. Members of the prosecution team testified that they never witnessed any inappropriate behavior between Donna Tucker and Detective Markel. (35 RT 6533, 6544 [Kevin McCormick, the prosecutor originally assigned to the case]; 37 RT 6936, 6939 [Detective Teague].)

6588, 6616, 6652.) At one point during the investigation, Detective Markel believed that Donna had a crush on him. (36 RT 3594.) He also believed that he may have mentioned details about his personal life, but to do so was not unusual. (36 RT 6588.) Detective Markel would talk about his motorcycle with other officers while witnesses, including Donna, were nearby. (36 RT 6609-6610.) The only phone number Detective Markel gave Donna was his office phone number. He did not give her his pager phone number. (36 RT 6611-6612.)

Donna Tucker wrote to Pauline that she had been promised reward money and that reward money would be set aside after the trial if there were a conviction. (36 RT 6707-6708, 6710.) Mary testified that Donna told her Detective Markel offered her a reward and that she would be accepting the reward for testifying at trial. (38 RT 7083-7084.) Donna testified, that in reality, reward money was never promised to her, nobody had discussed reward money with her prior to the trial, and she did not receive any reward money. (36 RT 6630, 6709, 6711; 37 RT 6912-6913, 6916-6917.)

b. Evidence Regarding Donna Tucker Knowledge Of A Possible Reward

Detective Kwock testified that he was not aware that a reward had been discussed with Donna Tucker prior to the trial. He also did not ask her about a reward during any interview he conducted with her prior to the trial. (36 RT 6620.) Donna did not mention to him whether Detective Markel or anyone else had told her about a reward prior to the trial. (36 RT 6621, 6624, 6634.) Donna had a conversation with the prosecutor after the trial about reward money. (36 RT 6629, 6639-6640, 6675; 37 RT 6913.) However, Donna said that she had found out about the reward from the newspaper or the television rather than from Detective Markel or any other detective. (36 RT 6640; 38 RT 6986-6987, 6990, 6992, 6994-6995, 6998.)

Donna Tucker told Detective Kwock that she testified truthfully at trial and did not testify because of the reward money. She testified only because she felt that it was the proper thing to do. She would have preferred that appellant had not committed the crimes so she would not have had to testify at all. (36 RT 6635.)

Detective Stephens said that there had never been a demand for reward money in the case. Had there been the request would have come to him because he was a lead investigator in the case. (38 RT 7000-7006.)

c. The Trial Court's Ruling

The trial court denied the motion for a new trial. The trial court found the testimony of Donna Tucker and Detective Markel credible in that they had a professional relationship and not a personal relationship and that Donna was not biased in her testimony at trial. Additionally, Donna's explanations for why she falsely conveyed that she was personally close to Detective Markel, to prevent harassment from the Verdugo family, "make a lot of sense" when considered against the conduct of the Verdugo family members that have testified. (39 RT 7234-7235.) As for the reward, the trial court observed that there was evidence that Donna may have known that the authorities had offered a reward in the case and that Donna wrote once to Pauline that she had been promised a reward. However, there was no other corroboration that she had been promised a reward and there was much evidence presented that she actually was not promised a reward. (39 RT 7235.)

Although the trial court doubted that the information produced at the new trial motion actually was newly discovered, the trial court based its ruling on having assumed for the sake of argument that the information was newly discovered. The probative value of the information in the letters was insignificant. The letters merely establish that Donna Tucker had a "girlish crush" on Detective Markel. The probative value is especially lacking when

compared to the "damning statements" made by appellant. (39 RT 7236.) Even if Donna's testimony had not been presented, the result of the guilt phase and the penalty phase of the trial would have been the same. (39 RT 7236-7237.) The court found that Donna's testimony "had less dramatic impact or emotional impact than the evidence that came in from other witnesses who had no connection" with the Verdugo family. (39 RT 7237.) Although Donna testified that appellant confessed he got a rush from killing the victims, the court observed that even if Donna lacked credibility, it did not undermine the testimony of the firefighters regarding the shooting - including that appellant shot into the ground to scare Yolanda and that he made her beg for her life. (39 RT 7207-7208.)

2. The Trial Court Properly Found That Donna Tucker Was Not Unfairly Biased, And Even If She Lacked Credibility, A Different Result At Trial Was Not Reasonably Probable

Substantial evidence supports the trial court's findings at the new trial hearing that Donna Tucker and Detective Markel were credible. (39 RT 7234-7235.) There was no evidence that Donna and Detective Markel actively engaged in inappropriate behavior prior to or after trial. As the trial court found, the behavior of the Verdugo family in trying to protect appellant justified Donna's conduct in falsely conveying to them that she had a close relationship with Detective Markel. (See 16 RT 2935, 2945, 2979-2980; 17 RT 3164-72; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877, 4028-4029, 4033-4034, 4041-4043; 22 RT 4109, 4112, 4132; 23 RT 4304-4313, 4322–4328; 24 RT 4557-4561; 26 RT 4863-4865, 4881-4892, 4942-4964.) Moreover, the trial court correctly identified that there was no evidence to corroborate the statement in one of Donna's letters that she had been promised reward money.

The trial court also correctly found that even if Donna Tucker's testimony were to have been disregarded due to her having a lack of credibility, there was still such substantial evidence of appellant's guilt and his deserving the death penalty that a different result at trial was not reasonably probable.

There was overwhelming evidence of appellant's identity as the murderer and his motive for killing the victims apart from Donna Tucker's testimony. The evidence showed that after the attack on Mike Arevalo at the party, appellant had a pump action, pistol grip, shotgun concealed in his car. Appellant told Ray Muro that he would retaliate against the person who attacked Arevalo. (10 RT 1899-1900, 1902; 11 RT 1946, 1948-1949, 1976-1977, 2009-2014; 17 RT 3188; 21 RT 4022-4023.) When the two victims left the party, they were followed by a car matching the description of the car appellant drove to the party. (9 RT 1492-1498, 1536.)

Firefighter Quintana and Firefighter Jones heard the shotgun blasts that killed the victims, heard Yolanda pleading with appellant to not shoot her, and saw the shooter return to a car that matched the description of appellant's car. Quintana heard what sounded like a pump action shotgun. (12 RT 2062-2072, 2086, 2089-2092, 2110-2111, 2114, 2123-2132, 2136, 2139-2142, 2072-2073, 2119, 2145-2146, 2176-2177, 2203, 2208, 2223; 13 RT 2298-2304, 2309, 2313, 2315-2317, 2319.)

Jones identified appellant as the shooter when he was shown videotape of the party. (10 RT 1895; 12 RT 2148-2154, 2186-2188.) Jones found appellant's eyeglasses at the scene of the shooting. (12 RT 2135, 2146-2147, 2183; 14 RT 2631-2632, 2638, 2670-2671.) Later in the evening, after the shooting, appellant told Mike Arevalo that the "situation had been handled." (9 RT 1658-1661, 1697-1698; 10 RT 1736-1737, 1907-1910; 11 RT 1983-1985, 1193-1194, 2020.)

After the murders, appellant, Paul and Sal had appellant's car repainted. (15 RT 2853-2855, 2858-2866; 16 RT 2889-2901, 2902-2910; 20 RT 3707; 30 RT 3791.) Appellant lied to Detective Teague concerning his location. (16 RT 2967, 2970-2975; 21 RT 4007-4011.) Sal helped appellant flee the Los Angeles area to avoid apprehension. When the police arrived at the Verdugo residence after appellant returned home, appellant was found in a hiding space. (17 RT 3164-3169, 3170-3172; 24 RT 4562, 4880; 26 RT 4896-4900, 4911-4912, 4919-4931, 4942-4967.)

Appellant directly ruined his own credibility by introducing into evidence eyeglasses that were fabricated by Paul and Sal. (16 RT 2935, 2945, 2979-2980; 18 RT 3510, 3534-3535, 3538-3539, 3542, 3554-3555; 21 RT 3870-3872, 3876-3877; 23 RT 4298-4303.) Appellant also admitted having lied to the police and having lied during his testimony. (24 RT 4567; 26 RT 5010-5011, 5015; 27 RT 5043-5045.)

Because the evidence overwhelmingly shows that appellant was the murderer and that the murders he committed were brutal, a different result at trial would not have occurred even if Donna Tucker's credibility had been impeached. Thus, the trial court acted well within its discretion in denying the new trial motion. Accordingly, this claim fails.

XVI.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO DISCHARGE TRIAL COUNSEL DURING THE NEW TRIAL MOTION

In his sixteenth claim, appellant contends that trial court erred in denying his request to discharge his trial attorney. Appellant claims that the trial court's error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and "analogous provisions of the California Constitution" because he was denied his rights to counsel, due process,

effective assistance of trial counsel, reliable determination of guilt and penalty, and a fair trial. (AOB 223-228.) Respondent submits that the trial court properly denied appellant's request.

A. Relevant Legal Proceedings

On November 20, 1998, while the new trial motion was pending,[51] appellant's trial attorney requested to be relieved from representing appellant due to a conflict of interest. (36 RT 6738.) The trial court observed that the request to relieve counsel was not timely as it was made for the first time in the middle of the new trial motion. However, the court inquired about the alleged conflict of interest. (36 RT 6739-6740.)

Appellant's trial counsel informed the court that Sal Verdugo, appellant's father, made a "veiled threat" against him. Counsel stated as follows:

> The threat basically was in the guise of if anything happens to my son, you will – you know, we'll see what happens to you basically. [¶] I believe that has affected my ability to represent [appellant] in a manner which I believe he's entitled to be represented.

(36 RT 6741.) Appellant's trial counsel did not report the matter to the police. (36 RT 6741-6742.) The threat occurred three weeks prior to the November 20 hearing, which also was after the previous court hearing in the case. The alleged incident occurred in the parking lot behind the courthouse. Nobody witnessed the incident. (36 RT 6748.) Appellant's brother, Paul Verdugo, subsequently asked appellant's trial counsel to call Sal. When counsel did so, Sal told him that he was upset, appellant was upset, and "don't forget." (36 RT 6750.)

---

51. Appellant's motion for a new trial was filed on August 13, 1998. (10 CT 2728.) The new trial motion was denied on June 18, 1999. (39 RT 7181, 7240.)

Appellant informed the court that he and his trial attorney had no communications outside of court since November 8. Appellant's trial counsel explained that he had not communicated with appellant by phone or in the county jail due to the threat from Sal. (36 RT 6746.)

However, the prosecutor had observed appellant's trial counsel speaking with Sal earlier in the day of the November 20 hearing. (36 RT 6754.) Appellant's trial counsel first responded that he did not tell Sal anything. (36 RT 6755.) The prosecutor informed the court as follows:

> Well, your Honor, [appellant's trial counsel] told me that he talked to [appellant's father] today and told [appellant's father] what the fuck are you doing here, you come to the scene of the crime, you committed perjury here, why are you here.

(36 RT 6755.) Appellant's trial counsel confirmed that the prosecutor accurately related the content of his conversation with Sal. (36 RT 6755.) The court was inclined to find that the "threat" was not "serious and credible." (36 RT 6763.) The court ordered the parties to file authority with the court and gave the parties the opportunity to investigate the matter. (36 RT 6764.) The subsequently heard testimony regarding the alleged conflict.

On November 24, 1998, Detective Stephens interviewed Sal who stated that he told counsel if anything were to happen to appellant, he would report counsel to the state bar or board. (37 RT 6774-6776.)

Paul confirmed that he told appellant's trial counsel to call Sal. Paul denied that he threatened counsel. (37 RT 6790-6792.) Sal confirmed that he had spoken with counsel twice within the previous six months - once on the phone and once in the parking lot. (37 RT 6801.) After one of the court sessions in October 1998, Sal followed counsel out of the courthouse to the parking lot to ask what was happening in the proceedings. (37 RT 6803.) Counsel refused to talk with Sal. When counsel entered his car, he turned to

Sal and said that he had to leave. Counsel also asked Sal for money. (37 RT 6804.) Before the court session had started that day, Sal gave counsel an envelope with $300 from Paul. (37 RT 6804-6805.)

Sal described the conversation in the parking lot follows:

> I told him, I said – you know, because of the way he's not telling me anything, I said to him – I said, George, man, you know, if my son goes down, I said, George, you know, because of your actions, I said, hey, if you're not doing your job, I says, you're going to go down too. I'm going to go before the board and see that you go down. That's what I said to him. And then he jumped in the car and took off because he wouldn't tell me anything else.

(37 RT 6805-6806.) Sal said that he was referring to reporting appellant's trial attorney to the state bar. He was told that if an attorney is not doing a good job, the attorney should be brought before the state bar. He believed that counsel had been doing well so far. Sal was concerned that counsel had stopped speaking with him. (37 RT 6806.)

Sal denied threatening counsel. He explained that he was on probation and that he was friends with counsel. (37 RT 6807.) Sal did not raise his voice during the meeting in the parking lot. (37 RT 6808-6809.)

During the phone conversation initiated by Paul, Sal only wanted to know what was going to happen at the next court session. He also asked appellant's trial counsel if he could come to court and sit in on the proceedings. (37 RT 6809.) Sal did not threaten counsel during the phone conversation or at any other time. (37 RT 6809-6810.)

Before the November 20 court session started, appellant's trial attorney told Sal that if he did not leave the courthouse, he would be "held by somebody here." Counsel also said that if he had to leave now, to leave. Sal then left the courthouse. (37 RT 6816-6817.) Counsel had told him that he might be held because of a statement he made during his testimony at trial. (37 RT 6818.) Sal

explained as follows:

> He said to me – he had told [me] earlier – when [we] were outside, he said, what are you doing here. [¶] I said I came to listen to what's going on wit my son, I said, since you don't tell me anything. [¶] Then he said you better leave because – because I think they're going to hold you for perjury or something. [¶] So I said, no, I'm going to sit in here and listen. [¶] Finally, at the end he came over there for about the fourth time and he told me. He said, leave, get out of here. So I left.

(37 RT 6819.)

The trial court denied the motion to relieve appellant's trial counsel. After hearing counsel's representations and the testimony of Sal and Paul, the trial court found that counsel simply overreacted to the statements of Sal and that no threat of violence was made. (37 RT 6838-6844.)

B. Relevant Legal Principles

When a criminal defendant who makes a timely request to discharge retained counsel ordinarily should he be permitted to do so. (*People v. Ortiz* (1990) 51 Cal.3d 975, 981; *People v. Lara* (2001) 86 Cal.App.4th 139, 152.) A criminal defendant's right to decide how to defend himself should be respected unless it will result in "significant prejudice" to the defendant or in a "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (*People v. Ortiz, supra*, 51 Cal.3d at p. 982; *People v. Crovedi* (1966) 65 Cal.2d 199, 208.) The defendant need not show inadequate representation or an irreconcilable conflict. (*People v. Ortiz, supra*, 51 Cal.3d at p. 984.) When an accused has been deprived of the right to discharge retained counsel, reversal is automatic and no prejudice need be shown. (*People v. Ortiz, supra*, 51 Cal.3d at p. 988.)

The trial court must balance the defendant's right to counsel of choice against the practical difficulties of continuing with the proceedings. (*People v. Ortiz, supra*, 51 Cal.3d at p. 984.) The trial court's denial of a defendant's

request to discharge retained counsel is reviewed for abuse of discretion. (*Id.* at p. 983.) In other words, the trial court retains discretion to determine whether discharge would disrupt the orderly processes of justice. (*Ibid.*; *People v. Lara, supra*, 86 Cal.App.4th at p. 152.)

C. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Request Because It Was Untimely

When appellant's trial attorney first informed the court that appellant sought to discharge him, the trial court observed that the request was not timely. (36 RT 6739-6740.) Appellant is simply incorrect in his assessment that "[w]ith defense counsel's assistance, new counsel could readily have been brought up to speed on the issues being litigated in connection with the motion for a new trial." (AOB 227.) To the contrary, when the request for discharge was made, nearly two months had passed since the new trial motion had been filed and there apparently was more investigation needed by the defense before being ready to proceed with the motion. (36 RT 6738; 10 CT 2728.) Appellant never explained that substitute counsel had been located and was willing to take over for his trial attorney. Consequently, even after finding new counsel willing to accept the case, new counsel would have had to review 35 volumes of reporter's transcript and 9 volumes of clerk's transcript of proceedings that had transpired since the beginning of trial. New counsel undoubtedly also would have had to review exhibits offered into evidence at trial, work product of appellant's trial attorney, and defense and prosecution discovery. Consequently, discharging trial counsel and allowing appellant to seek new counsel would have greatly and unreasonably disrupted the proceedings.

The trial court carefully considered appellant's request and gave the parties an opportunity to investigate and litigate whether trial counsel was operating under a conflict of interest. Following the presentation of evidence, and the trial court's determination that Sal and Paul were credible, the trial court

found that appellant's trial counsel simply was overreacting to statements made by Sal and that no threat of violence had been made. After having found that there was no threat, then the purpose for the request to discharge trial counsel could only have been for delay purposes.

Because a vast amount of time would have been needed for a new attorney to continue on with appellant's representation, and because appellant's trial attorney mis-perceived that Sal threatened him, the trial court acted well within its discretion in denying the request to discharge appellant's trial attorney. This claim fails.

XVII.

APPELLANT'S CHALLENGES TO THE VALIDITY OF PENAL CODE SECTIONS 190, ET. SEQ ARE WITHOUT MERIT

Appellant next raises several challenges to the validity of Penal Code sections 190.3 and 190.2. These claims have been previously rejected by this Court in other cases. Consequently, they merit little discussion.

Appellant contends that Penal Code section 190.3, as a whole, is unconstitutionally vague and violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution. (AOB 228-232.) This claim has been rejected by this Court in *People v. Cook, supra*, 39 Cal.4th at pp. 617-618. (See *People v. Griffin* (2004) 33 Cal.4th 536, 598; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.)

Appellant argues that factor (a) of Penal Code section 190.3 fails to separately weight the "circumstances of the crime" as a factor in aggravation. Thus, he claims that factor (a) is unconstitutionally vague and violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution. (AOB 232-236.) This claim has been rejected by this Court in *People v. Ochoa* (2001) 26 Cal.4th 398, 462. (See *People v. Ray, supra*, 13 Cal.4th at pp. 358-

359; *People v. Arias* (1996) 13 Cal.4th 92, 187.)

Appellant contends that the unitary list of factors in Penal Code section 190.3 erroneously fails to specify which factors are aggravating and which are mitigating, does not limit aggravation to the factors specified, and fails to properly define aggravation and mitigation. Thus, appellant maintains, section 190.3 violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution. (AOB 236-237.) This claim has been rejected by this Court in *People v. Nakahara* (2003) 30 Cal.4th 705, 721, and *People v. Farnham* (2002) 28 Cal.4th 107, 191.

Appellant contends that Penal Code section 190.3 is unconstitutionally vague because it fails to limit the sentencer's consideration of specified aggravating factors. Section 190.3 also allows the prosecutor to argue non-statutory matters as evidence in aggravation.[52] (AOB 237-240.) This argument was rejected in *People v. Jenkins* (2000) 22 Cal.4th 900, 1052-1053. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 973-980, 114 S.Ct. 2630, 129 L.Ed.2d 750.)

Appellant contends that Penal Code section 190.3 erroneously fails to define mental illness as a mitigating factor and that the use of "extreme" to modify "mental illness" renders this section unconstitutionally vague. (AOB 240-244.) These claims have been rejected by *People v. Rogers, supra*, 39 Cal.4th at p. 893, and *People v. Vieira* (2005) 35 Cal.4th 264, 304.

Appellant contends that all of the specified aggravating and mitigating factors are unconstitutionally vague. (AOB 244-245.) This Court has rejected this "catchall" argument in *People v. Jones, supra*, 30 Cal.4th at p. 1129.

---

52. Appellant also contends that age should be considered only a factor in mitigation. For the reasons stated in Section XII, *supra*, age is not limited to only a factor in mitigation.

Appellant contends that Penal Code section 190.3 erroneously fails to require that aggravating factors be proven beyond a reasonable doubt, fails to require that the aggravating factors outweighing the mitigating factors be proven beyond a reasonable doubt, and that death as the appropriate penalty be proven beyond a reasonable doubt. (AOB 245-249.) These arguments were recently rejected by this Court in *People v. Smith* (2007) 40 Cal.4th 483, 526:

> A jury is not required to find beyond a reasonable doubt that (1) individual aggravating factors exist (except for other crimes); (2) the aggravating factors substantially outweigh the mitigating ones; or (3) death is the appropriate penalty. (*People v. Avila* (2006) 38 Cal.4th 491, 614, 43 Cal.Rptr.3d 1, 133 P.3d 1076; *People v. Snow* (2003) 30 Cal.4th 43, 126, 132 Cal.Rptr.2d 271, 65 P.3d 749; *People v. Kipp, supra,* 26 Cal.4th 1100, 1137, 113 Cal.Rptr.2d 27, 33 P.3d 450.) These conclusions are not modified by the recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. (*People v. Morrison* (2004) 34 Cal.4th 698, 709, 21 Cal.Rptr.3d 682, 101 P.3d 568.)
>
> Moreover, "'[b]ecause the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt,' the federal Constitution does not require the prosecution to bear the burden of proof or burden of persuasion at the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643[, 276 Cal.Rptr. 874, 802 P.2d 376]. . . .)" (*People v. Sapp* (2003) 31 Cal.4th 240, 317, 2 Cal.Rptr.3d 554, 73 P.3d 433; see also *People v. Bemore* (2000) 22 Cal.4th 809, 859, 94 Cal.Rptr.2d 840, 996 P.2d 1152.)

Thus, appellant's claim fails.

Appellant contends that section 190.3 erroneously fails to require that the jury make written findings regarding the individual aggravating factors. (AOB 249–250.) This claim was recently rejected by this Court in *People v. Beames, supra*, 40 Cal.4th at p. 935. (See *People v. Morrison, supra*, 34 Cal.4th at pp.

730-731.)

Appellant contends that Penal Code section 190.3 fails to povide for comparative appellate review to prevent arbitrary, discriminatory or disproportionate imposition of the death penalty. He also contends that he has been denied equal protection because non-condemned inmates are entitled to such review pursuant to Penal Code section 1170, subdivision (f). (AOB 250-252.) This Court recently rejected this claim in *People v. Beames, supra* 40 Cal.4th at p. 935. (See *People v. Morrison, supra*, 34 Cal.4th at p. 731.)

Appellant contends that Penal Code section 190.3 also is unconstitutionally vague for not employing the above-mentioned "safeguards." (AOB 252-253.) As this Court has found that none of appellant's earlier challenges have merit individually, there also is no merit in considering appellant's claims collectively.

Appellant contends that Penal Code section 190.2 fails to perform the constitutionally required function of narrowing the population of death-eligible defendants. (AOB 254-257.) This Court recently rejected this claim in *People v. Beames, supra* 40 Cal.4th at pp. 934-935. (See *People v. Morrison, supra*, 34 Cal.4th at p. 730.)

Appellant contends that Penal Code section 190.2, subdivision (a)(3), the special circumstance for multiple murder, fails to perform the constitutionally-required narrowing function because it theoretically encompasses two accidental or common felony murders. (AOB 258-259.) This Court recently has rejected this argument in *People v. Boyer* (2006) 38 Cal.4th 412, 483. (See *People v. Boyette, supra*, 29 Cal.4th at p. 440.)

Appellant contends that because the jury could consider the multiple murder as both a special circumstance pursuant to Penal Code section 190.2, subdivision (a)(3), and a penalty phase aggravating factor pursuant to Penal Code section 190.3, subdivision (a), a "death-biased process" has been created.

(AOB 260-261.) This claim lacks merit. As this Court explained in *People v. Medina* (1995) 11 Cal.4th 694, 779:

> We have rejected similar contentions, based on our conclusion that (1) the jury is not apt to give undue weight to the facts underlying the present offenses merely because those facts also give rise to a special circumstance [citations omitted], and (2) the jury is entitled to consider that defendant's conduct involved the commission of multiple felonies (see *People v. Melton* [1988 44 Cal.3d 713, 767]).

Moreover, any possibility of prejudice is remote because appellant has not contended that the prosecution urged the jury to double count the facts or special circumstances in this case. (*People v. Medina, supra*, 11 Cal.4th at p. 779, citing *People v. Melton, supra*, 44 Cal.3d at pp. 768-769.)

Appellant contends that Penal Code sections 190 to 190.5 violate the Eighth and Fourteenth Amendments of the Constitution because they give the prosecutor complete discretion to determine whether to seek the death penalty. (AOB 261-263.) This claim was rejected by this Court recently in *People v. Lewis, supra*, 39 Cal.4th at p. 1068. (See *People v. Brown, supra*, 33 Cal.4th at p. 403.)

Lastly, appellant contends that his challenges to California's death penalty law, collectively, violate the Fifth, Sixth, Eight, and Fourteenth Amendments, as well as his "analogous state-created rights." (AOB 263.) This claim fails because, as set forth above, none of appellant's challenges have merit individually. Consequently, they also lack merit when viewed collectively.

XVIII.

APPELLANT'S CONVICTION AND SENTENCE DO NOT VIOLATE INTERNATIONAL LAW

In his eighteenth claim, appellant argues that he was denied the rights guaranteed him under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. (AOB 263-280.) This claim haws recently been rejected by this Court in *People v. Ramirez* (2006) 39 Cal.4th 398, 479. (See *People v. Cornwell, supra*, 37 Cal.4th at p. 106; *People v. Harris* (2005) 37 Cal.4th 310, 366; *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown, supra*, 33 Cal.4th at p. 404.)

XIX.

APPELLANT HAS FAILED TO DEMONSTRATE THAT ANY ERROR OCCURRED AT TRIAL

In his nineteenth and final claim, appellant argues that the "cumulative prejudicial effect of all the errors" at trial violated his rights to a fair trial, an impartial jury, a reliable determination of guilt and penalty, and fundamental fairness. Thus, he has been denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution. (AOB 281-283.) As demonstrated above, no prejudicial error occurred at trial. Accordingly, appellant has not been subjected to cumulative prejudice. This claim fails.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of death.

Dated: June 20, 2007

Respectfully submitted,

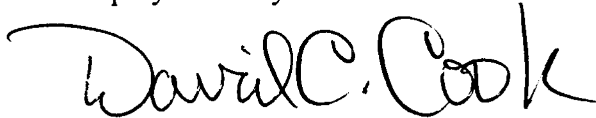
EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

JOHN R. GOREY
Deputy Attorney General



DAVID C. COOK
Deputy Attorney General

Attorneys for Respondent

DCC:lpn
LA1999XS0026
50166829.wpd

CERTIFICATE OF COMPLIANCE

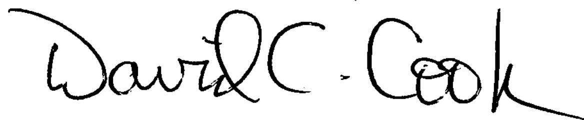
I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 59864 words.

Dated: June 20, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

JOHN R. GOREY
Deputy Attorney General



DAVID C. COOK
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Nathan James Verdugo***

No.: **S083904**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 22, 2007, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

John F. Schuck
Attorney at Law
Law Offices of John F. Schuck
4083 Transport Street, Suite B
Palo Alto, CA 94303
Counsel for Appellant Nathan Verdugo

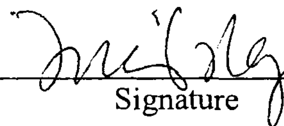
Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Michael Duarte
Deputy District Attorney
Los Angeles County District Attorney's Office
210 West Temple Street, 18th Floor
Los Angeles, CA 90012

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
For Delivery to:
Hon. Curtis B. Rappe, Judge

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 22, 2007, at Los Angeles, California.

Lisa P. Ng
Declarant


Signature

50170032.wpd